# United States Court of Appeals for the Second Circuit



# APPELLANT'S BRIEF & APPENDIX

76-15/3

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 76-1513

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

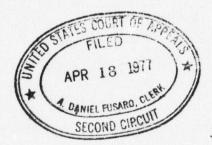
JOSEPH A. LOMBARDO, et. al.,

Defendants-Appellants

ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF

NEW YORK

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT



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### QUESTIONS PRESENTED

- 1. Was the Defendant's right to a fair trial prejudiced by the substitution of alternate jurors?
- 2. Was the Government's application in support of the wire-tap orders sufficiently detailed?
- 3. Was it illegal for the Defendant to be sentenced to consecutive sentences upon his conviction of violating 18 U.S.C. §1955 and U.S.C. §371?
- 4. Was it reversible and prejudicial error for the trial judge not to recuse himself from presiding over Appellant's trial?

### PRELIMINARY STATEMENT

This is an Appeal from a judgment of conviction in the United States District Court for the Western District of New York (Elfvin, District Judge), entered October 12, 1976, convicting the Defendant of conspiracy to commit offenses against the United States by conducting, financing, managing, suprevising, directing and owning an illegal gambling business and the substantive offense of conducting such gambling business and destruction of property to prevent seizure, in violation of 18 U.S.C. §371, 18 U.S.C. §1955 and 18 U.S.C. §2232.

### STATEMENT OF FACTS

On January 7, 1976, an Indictment was filed in the Western District of New York charging five defendants with Operating an Illegal Gambling Business (18 U.S.C. §1955) and Conspiracy to Operate an Illegal Gambling Business (18 U.S.C. §371). An investigation of the alleged Illegal Gambling Business began in June of 1975 when the Federal Bureau of Investigation developed information, through the use of informants, concerning the operation of what came to be referred to as the "Joseph Lombardo Sports - Bookmaking Business."

During the course of the investigation
the FBI continued to accumulate and use informant
information. The FBI also conducted physical surveillance. Thereafter, on October 31, 1975, application was
made to the Honorable John T. Elfvin, Judge of the
United States District Court for the Western District
of New York for orders authorizing wire-taps for two
telephones located at 291 Palmdale Drive, Amherst,

New York, and for the installation of pen-register devices for the same telephones. The applications were granted and the telephone taps and pen-registers were installed. Thereafter, on December 1, 1975, an application was again made to Judge Elfvin, based in part upon information gathered as a result of the October 31st orders, for a continuation of the October 31st orders, and for wire-tap and pen-register orders for telephones located at Three Windham Court, Amherst, New York. Evidence gathered as a result of all orders was admitted at trial.

Trial began on August 17, 1976, and during voir dire one of the jurors, Mr. Mason, indicated that he had vacation plans for August 27. Previously, another juror, Mr. Gardner, had advised the Court of a business commitment on September 7, 1976. Despite this information, the jurors were allowed to sit, and the selection of two alternate jurors began. These jurors were promised that they would be relieved of service if their plans could not be modified.

Alternate Juror Number Two, Mr. Fox, informed the Court and counsel that he was in training as an Internal Revenue Agent and that as part of his duties he dealt directly with the interception and recording of taxpayers' conversations. At this point the defense challenged Mr. Fox for cause. This challenge was denied and because there were no more peremptory challenges available to the defense, counsel were forced to accept Mr. Fox.

On August 27, 1976, mid-way through the trial, the juror who had advised the Court during voir dire of vacation plans, informed the Court that his plans could not be changed, and he was then relieved from the jury. Thereafter, on September 3, 1976, a second trial juror, Mr. Gardner, asked the Court to be relieved from further service by reason of a business engagement, which engagement, as stated above, was known by the Court to exist at the outset of the trial. The Court, at this time, gave Mr. Gardner the option of returning or not returning on September 7, 1976. Mr. Gardner did not return on September 7, 1976, and accordingly, Mr. Fox was seated.

moved the Court to recuse itself. The basis for the motion was that the judge had been United States Attorney for the Western District of New York during a period of time when the defendant was under indictment for unrelated offenses. After the jury returned its guilty verdict against the defendant on all three counts, Judge Elfvin sentenced the defendant to two years in the custody of the Attorney General for the violation of 18 U.S.C. \$1955, two years for the violation of 18 U.S.C. \$2232, all sentences to run consecutively. Three of the other defendants were sentenced to one year in the custody of the Attorney General, with the final defendant being placed on probation.

### POINT I

THE APPLICATIONS FOR WIRE-TAP AND PEN-REGISTER WERE INADE-QUATE AS A MATTER OF LAW.

For a court to issue an order authorizing the interception of a wire or oral communication,
the application must be in writing upon oath or
affirmation. The application must include the information specified in 18 U.S.C. §2518(1), subsection (c)
of which requires that the application contain,
among other things:

"a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

In order for the wire-tap to be lawfully authorized, there must be compliance with all of the requirements of 18 U.S.C. §2518, and where any of the statutory requirements are unsatisfied, the intercepted communications must be suppressed. <u>United States</u>
v. <u>Giordano</u>, 416 U.S. 505 (1974). In <u>Giordano</u> the
Supreme Court said at page 515:

"Congress legislated in considerable detail in providing for applications and orders authorizing wire-tapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the Court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The only allegation contained in the October 31, 1976, application, other than "boiler plate" language, is on page 22 of the application, where it is stated:

"Sources One and Two have both stated that they will not testify as to the information they provided."

In <u>United States</u> v. <u>Steinberg</u>, 525 F. 2d

1126 (2nd Cir. 1975), where this Court was concerned

with the minimum standards for compliance with the

statute, the application stated, as justification for

a wire-tap warrant for an alleged narcotics dealer,

that covert access could not be developed because

narcotics dealers are usually wary of surveillance,

very rarely keep records, deal with only a few trusted

individuals and isolate themselves from other individuals

in the distribution organization. The court, in dis
cussing the sufficiency of these allegations, stated

at page 1130:

"While the Government will be well advised in the future to include a more detailed factual statement indicating the inadequacy of other investigative techniques, the affidavit herein

did contain enough data to permit the authorizing judge reasonably to conclude that other means would be unlikely to succeed in revealing the scope of Steinberg's operation and his sources of supplies."

Several other courts of appeals have ruled upon what constitutes compliance with 18 U.S.C. §2518(c). These include the inability to identify the scope of the operation or the identities of the persons involved, United States v. Mateja, 541 F. 2d 741 (8th Cir. 1977) and United States v. Woods, 544 F. 2d 242 (6th Cir. 1976); where the informant could not give extensive information, United States v. Schwartz, 535 F. 2d 160 (2nd Cir. 1976); and where the target of the investigation was suspicious of strangers, physical surveillance would be difficult and potentially dangerous, and an increased frequency of contacts with the undercover agent would have disclosed his undercover role. In re Dunn, 507 F. 2d 195 (1st Cir. 1974). No court, it is submitted, has approved the mere assertion of an allegation as that contained in this case.

In the instant case, the reason for the absence of the necessary factual allegations to support the "boiler plate" language in the application for the wire-tap order is obvious from the application itself. That is, the Federal Bureau of Investigation had successfully been conducting an investigation of the "Joseph Lombardo Sports - Bookmaking Business" for approximately four months prior to the date of the application for the wire-tap order. During the course of the investigation the FBI was able to determine precisely four of five principals who were indicted, and the "nick-name" of the fifth. The thirty-two page affidavit accompanying the application details, with considerable specificity, physical surveillances, record checks and conversations with informants and secondary sources.

Aside from the "boiler plate" assertions contained in the application, the only factual reason presented to the judge to explain why normal investigative procedures were not possible, is the alleged reluctance of informants to testify. The judge was

never informed as to the basis of the informant's reluctance, nor whether or not any actions could be taken to remove the informant's reluctance. No facts were presented as to whether the reluctance could be removed by a grant of immunity or by prosecutorial or judicial leniency toward the informer.

It must also be noted that the "boiler plate" assertions concerning the inability to continue the investigation made in the applications are not accurate. Prior to making the application normal investigative techniques were utilized. As previously noted, these normal investigative techniques disclosed four of the five principals of the "Joseph Lombardo Sports - Bookmaking Business," the location of the business, the telephone numbers of the business and the possible identity of the fifth, and last member of the organization. It is obvious that this last member of the "business" could have been determined by normal

investigative techniques. Once Donald DiCarlo was identified, he could have led the agents to Three Windham Court and this would have further led to the discovery of Mr. Owczarzak.

Notice should also be taken that the FBI failed to disclose in their affidavit prior surveillance contact with Mr. Owczarzak (Appendix 84 - 87), thereby demonstrating that, in fact, the telephone wire-taps were unnecessary to determine the identity of all of the defendants. It is submitted that in making the applications for the wire-tap orders these pertinent facts were intentionally omitted in an attempt to mislead the judge into the conclusion that the extraordinary investigative technique of telephone wire-taps was necessary to continue the investigation. It is further submitted that, even taking into consideration this omission, the applications failed to properly demonstrate the need for telephone wire-taps pursuant to 18 U.S.C. §2518(c) and, accordingly, the use of the fruits of the wire-taps and pen-register evidence should have been suppressed.

### POINT II

THE COURT, BY NOT EXCUSING TWO JURORS WHO WOULD BE UNABLE TO HEAR THE FULL TRIAL, AND, BY NOT EXCUSING ALTERNATE JUROR NUMBER TWO, EFFECTIVELY DENIED THE DEFENDANT A FAIR TRIAL BY A JURY OF TWELVE SELECTED BY HIM.

Rule 24 of the Federal Rules of Criminal Procedure allows defendants ten peremptory challenges where the possible sentence of the Court can exceed one year; the Court can allow defendants additional challenges if the situation so warrants. While the right to peremptorily challenge is not a right guaranteed by the Constitution, it is an important statutory right which helps to assure a defendant that his case will be heard by a fair, impartial jury. The Fifth Circuit Court of Appeals in <u>United States v. Sams</u>, 470 F. 2d 751 (5th Cir. 1972), stated that any system of empanelling jurors which denies the defendant

a full, unrestricted use of the peremptory challenges to which he is entitled should be condemned. In the case cited, the Court reversed the conviction of the defendant because his counsel inadvertently waived challenges to which the defendant was entitled.

It is important to note that in the present case the Court was aware from the outset of jury selection that two of the jurors who had been sworn would not be able to serve throughout the trial (Appendix 72 - 74). Accordingly, the defendants were deprived of the opportunity to properly use the peremptory challenges to which they were entitled. The reason why this is so becomes apparent on examination of the method by which defendants determine which jurors they will excuse peremptorily.

In the case at bar, peremptory challenges were exercised in "rounds" after twelve veniremen were seated and questioned by the Court.

Accordingly, the defendants, at all times, should have the opportunity to consider twelve potential jurors, and thereafter, make the determination as to which of the twelve potential jurors they will excuse peremptorily. However, the defendants were never afforded the opportunity to view the potential jury of twelve people prior to having to make the decision of which jurors were to be excused. It was apparent to the Court that Mr. Mason and Mr. Garaner would be unable to serve throughout the entire trial. Consequently, the defendants were forced to make the decision on whom to excuse based upon a panel of only ten jurors. The practical effect was that the actual selection of the jury was completed only after the two alternate jurors were seated.

As this Court is well aware, the decision whether or not to excuse a juror is, from the defense's point of view, largely a matter of determining what or who is the lesser evil. The defendants

have a limited number of peremptory challenges which are used to eliminate those potential jurors whom the defendants feel would be most prejudicial to their cause; in short, the defendant should be afforded the opportunity of eliminating the "worst" ten jurors. In the case at bar, the defendants were denied this right because two of the jurors they had to consider should not have been called to sit on this case in the first instance.

It is not the defendants' contention that the Court in the sole act of excusing the two jurors, abused its discretion to such an extent that reversal is required. The defendants' contention is that the Court committed error in initially allowing the two jurors to be sworn, and that this error was consumated, or compounded, when both jurors were excused. By excusing both jurors, the Court paved the way for Alternate Number Two, Mr. Fox, to participate in the deliberations and the verdict.

At the time Mr. Fox was seated as potential Alternate Juror Number Two, the defendants had used all the peremptory challenges they were allowed. Despite the fact that Mr. Fox was employed as an Internal Revenue Service Agent who dealt with intercepting and recording of taxpayers' conversations, the Court refused to excuse him for cause.

Consideration should also be given to the manner in which Mr. Gardner was allowed to excuse himself from jury service. While the Court informed counsel and the defendants of the problems Mr. Gardner was facing, the Court ultimately left it completely up to the discretion of the juror as to whether or not he would return. In practical effect Mr. Gardner was allowed to excuse himself.

United States v. Bailey, 468 F. 2d 652 (5th Cir. 1972) sets forth the proposition that absent a clear abuse of discretion the trial judge's action in dismissing a juror will not be disturbed on appeal.

Although, taken alone, the excusing of the jurors in the instant case may not amount to an abuse of discretion, the series of rulings outlined above, taken in combination, requires reversal.

In combining the trial Court's failure to excuse the jurors prior to their being sworn and the failure to excuse Alternate Juror Number Two for cause, reversible error was committed. The defendants were denied their rights to properly exercise the peremptory challenges they were given and they were then prejudiced by the seating of a juror who should have been excused for cause. Accordingly, where there is error committed in the replacing of jurors and the defendant thereby demonstrates that he has been prejudiced as a result, the conviction should be reversed. United States v. Ellenbogen, 365 F. 2d 92 (2nd Cir. 1966), Cert. Den. 386 U.S. 923 (1967).

### POINT III

IT WAS ILLEGAL FOR THE DEFENDANT TO BE SENTENCED TO CONSECUTIVE SENTENCES UPON HIS CONVICTION OF VIOLATING 18 U.S.C. \$1955 AND U.S.C. \$371.

In <u>Ianelli</u> v. <u>United States</u>, 420 U.S. 770 (1975), the Supreme Court considered the question of whether or not an individual can be convicted and thereafter sentenced separately for violations of 18 U.S.C. §1955 and 18 U.S.C. §371. The court concluded that individuals can be convicted and sentenced for violations of both sections.

Under any construction of the evidence, the gambling business in question consisted solely of the five indicted defendants. Accordingly, this court is urged to consider whether or not the rationale of the Supreme Court should be applied in those cases where the illegal gambling business consists of only five people.

This appeal is not directed at the conviction for both conspiracy and the substantive crime, but rather the imposition of consecutive sentences for both convictions (Footnote 18 of Ianelli, supra.). If the Court finds that consecutive sentences can be given in cases such as this, it will in effect be allowing the imposition in every case where 18 U.S.C. \$1955 is violated greater punishment than is contemplated under that section, thus always putting defendants in jeopardy of being punished twice for the same act.

If Congress had meant a violation of 18 U.S.C. §1955 to carry a penalty of up to ten years in prison, Congress would have so indicated. Yet, if consecutive sentences can be imposed in cases such as the case at bar, the practical effect is that every time there is a violation of 18 U.S.C. §1955, a sentence of up to ten years in prison can be imposed.

violate 18 U.S.C. \$1955 which contains less than five persons. That is, if two persons agree to operate a gambling business consisting of five or more people, and thereafter take steps to accomplish this conspiracy, a violation of 18 U.S.C. \$371 is committed. But in such a situation there cannot be a violation of 18 U.S.C. \$1955 until at least three other persons become involved, and the question of consecutive sentences cannot arise until that time.

The Court in <u>United States v. Jeffers</u>,

532 F. 2d 1101 (7th Cir. 1976), in speaking of the
interpretation of <u>Wharton's Rule</u> by the Court in <u>Ianelli</u>,
supra, stated at page 1109:

"Thus, the focus to determine if two offenses are the same for double jeopardy purposes, at least in regard to complex statutory crimes, now appears to center on the Congressional intent with regard to such crimes."

It is inconceivable that Congress could have meant to impose a possible criminal sanction of ten years in prison for every violation of a statute where the maximum term of imprisonment is five years. Therefore, in order to carry out the Congressional intent, where the conspiracy involves the minimum number of persons needed to constitute a violation of the substantive offense, the imposition of consecutive sentences should not be permitted.

### POINT IV

IT WAS REVERSIBLE AND PRE-JUDICIAL ERROR FOR THE TRIAL JUDGE NOT TO RECUSE HIMSELF FROM PRESIDING OVER APPEL-LANT'S TRIAL.

Before the start of Appellant's trial, and during its pendency, defense counsel made continuous and ongoing motions asking the presiding judge, Honorable John T. Elfvin, to recuse himself from the case. Judge Elfvin took cognizance of defense counsel's motions and, on the merits, denied them. It is Appellant's contention that the trial court erred in denying these motions, and, because of the serious nature of his bias against Appellant, was a prejudicial influence on the trial.

Pursuant to 28 U.S.C. §455 and Rule 52(b) of the Federal Rules of Criminal Procedure, the failure of the trial judge to recuse himself on motion, can be "plain error . . . affecting substantial rights" and, as such, can form the basis of a reversal of the conviction (Tomley v. United States, 250 F. 2d 549, Cert. Den. 356 U.S. 928).

It is Appellant's contention Judge Elfvin's tenure as United States Attorney (1972 - 1974), and his involvement in the investigation of Appellant, made bias inevitable.

Appellant's activities in the Buffalo area have been given much publicity in the last few years. He has been the center of a continuing investigation by the Internal Revenue Service, United States Attorney, Federal Bureau of Investigation and the Federal Strike Force, since 1967, because of alleged gambling activities. In 1970 Appellant was indicted for alleged gambling activity (Indictment Number 1970-203). Thereafter, in 1971 Appellant was brought to trial by the United States Attorney's office. In 1972, the charges were dismissed for failure to prosecute.

As the United States Attorney's office continued these investigations, and brought Appellant to trial, Buffalo area media reported the events extensively. Media and public pressure was put on the United States Attorney's office to put an end to this "organized crime" gambling activity.

It is fair to state that this trial was the culmination of some ten years of investigation of the Appellant, an investigation which was pursued by the United States Attorney's office throughout Judge Elfvin's tenure as United States Attorney. It is submitted that after having acted as prosecutor for a period of years in similar matters involving this defendant, the Court must be deemed to have been affected with substantial bias. In this context the Court is asked to consider, 28 U.S.C. §455, which provides:

"Any justice or judge of the United States shall disqualify himself in any case in which he

has a <u>substantial</u> interest, has been of <u>counsel</u>, is or has been a material witness, or is <u>so</u> related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein." (Emphasis supplied)

This section has been specifically interpreted to include United States Attorneys. A United States Attorney is "of counsel" for the United States in all criminal cases, within the meaning of this section. United States v. Maher, 88 F. Supp. 1007 (D. Maine N.D. 1950). Where a district court judge has been of counsel, recusal is mandatory, and prejudice is presumed. United States v. Amerine, 411 F. 2d 1130) (6th Cir. 1969). The salutory purpose of Section 455 is to assure not only actual impartiality, but also the appearance of detached impartiality. Texaco, Inc. v. Chandler, 354 F. 2d 655, Cert. Den., 383 U.S. 936; School Dist of Philadelphia v. Harper & Row Publishers, 267 F. Supp. 1001 (E.D., Pa, 1967).

"Substantial interest", within the meaning of the section has been interpreted to include any interest a lawyer might have in pushing his case to a successful conclusion. Adams v. United States, 302 F. 2d 307, (Dist. Ct. 5th Cir. 1962). Such an interest can include personal connections with a case. Hobson v. Hansen, 265 F. Supp. 903 (Dist. Col. 1967).

Clearly, under Section 455 and cases interpreting it, Judge Elfvin should have removed himself from this case. He was involved in the ongoing investigation of Appellant for his many years as United States Attorney. He had personal ties with the federal investigators and Assistant United States Attorneys, who had investigated Appellant, and who were now prosecuting him. Impartiality, actual and apparent, could only have been assured by Judge Elfvin's recusal.

Finally, it is submitted that Judge

Elfvin's bias and prejudice against Appellant was manifested in the extremely harsh sentence which he was

given. Although the position may be taken that consecutive sentences are proper in this case, such a disposition verges upon a violation of the principle that a defendant should not be twice punished for the same conduct.

A first offender, with no criminal record, and who was the subject of what can be considered an extremely favorable pre-sentence report, should not be sentenced to a five year term of imprisonment for a non-violent, victimless crime. It seems proper to conclude that Judge Elfvin sentenced Appellant based upon a pre-conceived notion about the man, a notion, which was the product of his many years of adversarial involvement with this defendant in matters closely related to the instant case.

# CONCLUSIONS

The Judgement of Conviction should be reversed, the evidence suppressed, the sentence modified, and the Indictment dismissed.

Respectfully submitted,

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# In the District Court of the United States

THE UNITED STATES OF AMERICA

For the Western District of New York
NOVEMBER 1975 SESSION,
IMPANELED NOV. 18, 1975

-VS-

JOSEPH A. LOMBARDO
DONALD A. DICARLO a/k/a "TONY"
RICHARD KELSEY
JACK M. SILVERSTEIN
EDWARD A. OWCZARZAK a/k/a "O-Z"

18 U.S.C. 1955 18 U.S.C. 2232

Vio.

No. 76 -

FILED: MAN 719/6

18 U.S.C. 371

COUNT I

The Grand Jury charges:

September 1, 1975 and December 20, 1975, in the Western District of New York and elsewhere, JOSEPH A. LOMBARDO, DONALD A. DiCARLO a/k/a "TONY", RICHARD KELSEY, JACK M. SILVERSTEIN and EDWARD A. OWCZARZAK a/k/a "O-Z", the defendants herein, and others, unlawfully did knowingly conspire, combine and agree together and with each other to conduct, finance, manage, supervise, direct and own an illegal gambling business in the form of a sports bookmaking operation which violated the provisions of Article 225 of the Penal Laws of the State of New York, all of which was in violation of Section 1955 of Title 18 of the United States Code; OVERT ACTS

And, during the period aforesaid, the said defendants and co-conspirators committed, among others, the following overtacts in furtherance of the said conspiracy and in order to effectuate the object and purpose thereof, to wit:

(1) On November 2, 1975, the defendant EDWARD A. OWCZARZAK a/k/a "O-Z", had a telephone conversation with the defendant RICHARD KELSEY over telephone number 716-633-2225, located at Apartment 6, 291 Palmdale Drive, Amherst, New York, during which the defendant

RICHARD KELSEY telephonically relayed sports line information to

the defendant EDWARD A. OWCZARZAK, a/k/a "O-Z";

(2) On November 7, 1975, the defendant JOSEPH A. LOMBARDO

- (2) On November 7, 1975, the defendant JOSEPH A. LOMBARDO had a telephone conversation with the defendant RICHARD KELSEY over telephone number 716-633-2225, located at Apartment 6, 291 Palmdale Drive, Amherst, New York, during which the defendant JOSEPH A. LOMBARDO had a conversation with the defendant RICHARD KELSEY about matters relating to the operation of the aforesaid illegal gambling business;
- (3) On November 8, 1975, the defendant JOSEPH A. LOMBARDO had a meeting with the defendant RICHARD KELSEY and with the defendant EDWARD A. OWCZARZAK, a/k/a "O-Z" in the parking lot in front of Ferrante's Restaurant, located at the corner of Maple and North Forest Roads, Amherst, New York;
- (4) On November 15, 1975, the defendant JACK M. SILVERSTEIN accepted an illegal bet on a football game over telephone number 716-633-2254, located at Apartment 6, 291 Palmdale Drive, Amherst, New York;
- (5) On December 3, 1975, the defendant DONALD A. DiCARLO, a/k/a "TONY" had a telephone conversation with the defendant RICHARD KELSEY over telephone number 716-633-2254, located at Apartment 6, 291 Palmdale Drive, Amherst, New York, during which the defendant DONALD A. DiCARLO, a/k/a "TONY" and the defendant RICHARD KELSEY discussed matters relating to the operation of the aforesaid illegal gambling business;
- (6) On December 5, 1975, the defendant RICHARD KELSEY accepted illegal bets on sporting events over telephone number 716-633-2225, located at Apartment 6, 291 Palmdale Drive, Amherst, New York;

(7) On December 8, 1975, the defendant JOSEPH A. LOMBARDO had a telephone conversation with the defendant RICHARD KELSEY over telephone number 716-633-2225, located at Apartment 6, 291 Palmdale Drive, Amherst, New York, during which the defendant JOSEPH A. LOMBARDO and the defendant RICHARD KELSEY discussed matters relating to the operation of the aforesaid illegal gambling business;

All of which was in violation of Section 371 of Title 18 of the United States Code.

#### COUNT II

### AND THE GRAND JURY FURTHER CHARGES:

That continuously from September 1, 1975 through

December 20, 1975, in the Western District of New York and elsewhere,

JOSEPH A. LOMBARDO, DONALD A. DiCARLO, a/k/a "TONY", RICHARD KELSEY,

JACK M. SILVERSTEIN and EDWARD A. OWCZARZAK, a/k/a "O-Z", the

defendants herein, unlawfully did conduct, finance, manage, supervise,

direct and own an illegal gambling business in the form of an

unlawful bookmaking operation involving sporting events which violated

Article 225 of the Penal Law of the State of New York, and all of

which was in violation of Section 1955 of Title 18 of the United

States Code.

# COUNT III

AND THE GRAND JURY FURTHER CHARGES:

That on or about December 20, 1975, in the Western District of New York, JOSEPH A. LOMBARDO unlawfully did destroy certain property, namely flash-paper, in order to prevent its seizure, before the said property could be seized by Special Agents PETER J. SOFIA and JOHN E. GILL, JR., of the Federal Bureau of Investigation, who were then and there duly authorized by law to search for and seize the said property;

All of which was in violation of Section 2232 of Title 18 of the United States Code.

RICHARD J. ARCARA United States Attorney Western District of New York

A TRUE BILL:

Foreman

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 5:05 P.M.

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(Defendants present, counsel present, jury present.)

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#### CHARGE OF THE COURT

THE COURT:

Now, I will try to make this as brief and as succinct as I can. Of necessity, it is my duty to tell you what all of the aspects of the law are that hear upon your deliberations. Bafore I do this I will mantion one point that you should bear in mind while I tall you what the law is, I said it before and the attorneys have said it, that is, that it is your duty and yours alone to datermine the facts in the case, and that includes the guilt or the innocence of each of the defendants. Also I may refer briefly to my recollection of the facts at one point or another, I don't know if I shall, but if I do it is merely to assist you in understanding the rules of law which I am going to tell you about. You are not to consider any such reference I may make here or that I made during the trial as in any way indicative of any verdict that I think you

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should render, and also the fact that I have denied motions which have been made from time to time by defense counsel or by the attorney for the Government or ruled upon their objections to different questions in certain ways, is not to be taken as any expression by me upon the facts of the case and, of course, even if you should so consider it, you would ignore any such opinion that I might have, and I stress to you that I have none. Rely wholly on your own recollection of what the evidence in the case shows, and do not be influenced by any remark that I have made or by what any attorney may have made in opening or during the course of the trial or during the closing arguments.

We have three counts in the indictment,
and I will so through them one at a time.

Count 1 of the indictment says, "That continucusly throughout the period between September 1,

1975 and December 20, 1975, in the Western

District of New York -- and I tell you that
the Western District of New York comprises
those seventeen counties which lie in the
western end of this state, and those seventeen

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include Erie County — in the Western District of New York, and elsewhere, Joseph A. Lombardo, Donald A. DiCarlo, Richard Kelsey, Jack M. Silvenstein and Edward A. Gwczarzak, the defendants herein, and others, unlawfully did knowingly conspire, combine and agree together and with each other to conduct, finance, manage, supervise, direct and own an illegal gambling business in the form of a sports bookmaking operation which violated the provisions of Article 225 of the Penal Laws of the State of New York, all of which is in violation of Section 1955 of Title 18 of the United States Code."

Which will come to you in the jury room as

Court Exhibit A, a certain listing of what is

known as evert acts, and under that it says,

"And during the period aforesaid said defendants

and co-conspirators committed, among others,

the following overt acts in furtherance of

said conspiracy and in order to effectuate

the object and purpose thereof, to wit — and

there are seven numbered paragraphs, the first

one, Number 1, "On November 2, 1975, the

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defendant, Edward A. Owczarzak had a telephone conversation with the defendant Richard Kelsey over telephone number 716-633-2225, located at Apartment 6, 291 Palmiale Drive, Amherst, New York, during which the defendant Richard Kelsey telephonically relayed sports line information to the defendant Edward A. Orczerzak. Secondly, on November 7, 1975, the defendant Joseph A. Lombardo had a telephone conversation with the GafenCant Richard Kelsey over telephone number 716-633-2225, located at Apartment 6, 291 Faladale Drive, Amberst, New York, during which the defendant Joseph A. Lombardo had a conversation with the defendant Richard Melsey about matters relating to the operation of the aforesaid illegal gambling business. Three, on November 8, 1975, the defendant Joseph A. Lowlardo had a moeting with the defendant Richard Kelsey and with the defendant Edward A. Owczarzak in the parking lot in front of Fercante's Restaurant, located at the corner of Maple and North Forest Road, Amherst, New York. Four, on November 15, 1975, the defendant Jack M. Silverstein accepted an illegal bet on a football game over telephone

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number 715-633-2254, located in Apartment 6, 291 Palmdale Drive, Amherst, New York. Number five, on December 3, 1975, the defendant Donald A. DiCarlo had a telephone conversation with the defendant Richard Kelsey over telephone number 716-633-2254, located in Apartment 6, 291 Palmiale Drive, Ambarst, New York, during which the defendant Donald A. DiCarlo and the defendant Richard Kelsey discussed matters relating to the operation of the aforesaid illegal gambling business. Six, on December 5, 1975, the defendant Richard Kelsey accepted illegal bets on sporting events over telephone number 716-633-2225, located at Apartment 6, 291 Palmale Drive, Amberst, Maw York. Mumber seven, on December 8, 1975, the defendant Joseph A. Losbardo had a telephone conversation with the defendant Richard Malsey over telephone number 716-633-2225, located in Apartment 6, 291 Paladale Drive, Arherst, New York, during which the defendant Joseph A. Lombardo and the defendant Richard Welsey discussed matters relating to the operation of the aforesaid illegal gambling business." And then the conclusory paragraph, "All of which

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was in violation of Section 371, Title 18.

United States Code. "That section provides in partiment part as follows: "If two or more persons complire to commit any offense against the United States, and one or more of such persons do any act to effect the object of the complicacy, each shall be punished as the law provides."

Now, Count 1 allegas that Erom September 1. 1975 through December 20, 1975, there was a conspiracy to violate Section 1955 of the Federal Criminal Codo, and that section provides in partinent part; "Whosver conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be punished as the law provides." That section goes on to define illegal gambling business as being one which is, firstly, in violation of the law of the state in which it is conducted; secondly, involves five or more persons who conduct, finance, manage, supervise, direct or own all or any part of such business, and third, has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross

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revenue of \$2000 in any single day.

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The type of gambling business involved in this indictment is that of a bookmaking operation involving sporting events. Decause the federal law defines in part an illegal gambling business as one which is in violation of the law of the state in which it is conducted, which of course is New York State, we necessarily turn to the law of the State of New York. Article 225 of the New York State Penal Law again in partinent part provides, firstly, certain definitions first of gambling, and Saction 225.00.2 says, "A person engaged in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." Subsection 9 of that same section defines bookmaking as meaning advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcome of future contingent events,

and the advancing of gambling activity is defined in Subsection 4 in this way, it says that a person advances gambling activity when acting other them as a player he engages in conduct which materially aids in any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of a particular schame, device or activity involved, toward the acquisition or maintanance of premises, paraphernalia, equipment or apparatus therefore, toward the solicitation or inducement of parsons to participate therein, toward the actual conduct of the playing phases thereof. toward the arrangement of any of its financial or recording phases or toward any other phase of its operation. One advances gambling activity when having substantial proprietary or other authoritative control over premises being used with his knowledge for purposes of gambling activity he parmits such to occur or continue or makes no effort to prevent its occurrence or continuation. The New York laws are not directed against the bettor, but are aimed at those persons involved in the

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business of gambling, and thus a player is excluded from criminal responsibility. Under New York law a player mosns a person who engages in any form of garbling solely as a contestant or better without receiving or bscoming entitled to receive any profit therefrom, other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who cagages in bookmaking, and that is in quotes, which refers to the defined term, is not a player and, finally, the state law provides that it is illegal for one to promote gambling when he knowingly advances or profits from unlawful gambling activity, and lastly, all gambling activity is unlawful unless specifically authorized by the state law.

Now, keep in mind that these defendants are not being charged and have not been charged here with any violation of New York State law.

There have been allusions to the fact that this case ought not be tried here in Federal court, and that the Government, the prosecutors are trying to make a federal case out of it.

Well, what we are concerned with is only a federal case. The defendants are charged with a violation of federal law. I have instructed you on the New York State law as it pertains to bookmaking only because the federal law defines illegal gambling business as one which violates the laws of the State of New York in this instance.

The second requirement that must be proved to establish an illegal gambling business is that it involves five or more parsons who conduct, finance, manage, supervise, direct or own all or part of it. Those six varbs that I have used, namely, conduct, finance, manage, supervise, direct or own are words that are used in their ordinary sense and meaning. The word "conduct" as used does not refer to pare betting oustowers or players who marely patronize a gambling business, but to conduct means to carry on, and refers to both high level bosses and street level employees, employees such as we might have testimony about here who man telephones. It includes all those who participate in the operation of a gambling business, regardless

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how minor their role, and whather or not thay would be labelled collectors, agents, runners, clerks, office workers, employees, writers or independent contractors who provide necessary services.

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Now, a person who accepts layoff bats may be considered a necessary participant in the operation of a gambling business, and he can be ecavicted if any of the following factors is present: Evidence that the person provided a regular market for a high volume of such bats or hald himself out to be available for such bets whomever bookmakers needed to make them; evidence that the person performed any other substantial service, as for example, supplying of line information or evidence that the person was conducting his own illegal gambling operation and was regularly exchanging layoff bets with other bookmakers. Before a parson who accepts layoff bats can be found to have conducted an illegal gambling business, it must be shown if he was an intrical part of the booksaking business. Evidence that the person accepted occasional layoff bets without more is insufficient to

find that he conducted an illegal gambling business. One of the listed factors or other evidence that the person was an intrical part of the booksaking operation is necessary.

To finance meens to take funds available. To manage means to run it or to have an important voice in the direction of the business. To supervise means to oversee or to give direction to the operation. To direct means to control the activities. To own means to have title in some demonstrable way to all or part of the business, such as sharing in the business' profits or lesses.

Now, at least five individuals must be involved in the end result or goal of the conspiracy, although fewer than five but at least two can have conspired to violate this federal law. The five or more individuals can have various roles and overlapping roles, for example, the ownership or the direction or the supervision or the management or the financing or the conduct can be by one person or by more than one person. Also one person can have more than one role, such as one can own, and/or direct and/or supervise, and/or

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manage, and/or conduct the activity. If you find that one person owned and directed and supervised and managed and financed the activity, and that at least four other persons conducted the activity, as the Government contends, that is sufficient violation, from the point of view of numbers, of the federal law, and if such violation he the aim of a conspicacy, then Section 371 has been violated.

the participants need not be limited to the five man who have been indicted, the indictment, which is no evidence, mays "and others," and you can find that there were other persons whose names you may or may not know, but who are otherwise fully and specifically identified to you, were participants. If you do, that would be sufficient to be a violation of Section 1955, and if such violation be the end result or goal of a conspiracy of two or more persons, then that would be a violation of Section 371.

The third element of the federal statute which prohibits illegal gambling businesses, namely, Section 1955, is that the gambling

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activity was in substantially continuous operation for a period in excess of thirty days or had a gross revenue of \$2000 in any one day. The Government is not required to prove both of these, it is sufficient if the Government proves one or the other. If you find that bets placed in any single day between September 1, 1975 and December 20, 1975 totalled at least \$2000, that would be sufficient on which to base a finding that the gambling business had a gross revenue in that amount in any single day. If, on the other hand, you found that there was an illegal gambling business in substantially continuous operation in excass of thirty days, it does not matter whether the business made a profit or whether it lost money or whether it received \$2000 in bets in any single day that it was in operation.

Now, a conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish a lawful purpose by unlawful means. Thus a conspiracy is a kind of partnership in criminal purposes in which each member becomes the agent of every other member, and the gist of

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the offense is the combination or agreement to violate or disregard the law. Mere similarity of conduct among various persons and the fact they may have associated with each other and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. However, the evidence need not show that the mambers enter into any express or formal agreement or that they directly by words spoken or in writing stated between or among themselves what their object or purpose was to be or the details thereof or the means by which the object or purpose was to be achieved. What the evidence must show in order to establish proof that a conspiracy existed is that the members in some way or manner or through some contrivance positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan. It is not necessary for the prosecution to prove that all of the means or methods set forth in the indictment were agreed upon to carry out the conspiracy or that all such means or methods were actually used or put into operation, but it is necessary

that the evidence establish to your satisfaction one or more of the means and methods described in the indictment was agreed upon to be used in an effort to effect or accomplish some object or purpose of the coaspiracy, as charged in the indictment.

Now, one may become a member of a conspiracy without full knowledge of all of the details of the conspiracy. On the other hand, a person who had no knowledge of a conspiracy, but merely happens to act in a way which furthers an object or purpose of the conspiracy, does not thereby become a member of the conspiracy, ha doss not become a conspirator. Dofore you may find that a defendant or any other person has become a member of a conspiracy, the evidence must show that the conspiracy was formed and that the defendant or other person, who is claimed to have been a member, knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. To participate knowingly and willfully means to participate voluntarily and understandingly, and with a specific intent to do some act which

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the law forbids or with a specific intent to fail to do some act which the law requires to be done, that is to say, to participate with had purpose, either to disobey or disregard the law. So if a defendant or other person, with understanding of the unlawful character of a plan, intentionally encourages, advises or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and willful participant, a conspirator. Cas who knowingly and willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the instigators of the conspiracy. In determining whether or not a defendant or any other person was a member of a conspiracy, you are not to consider what others may have said or done, that is to say, the membership of a defendant or other person in a conspiracy must be established by evidence as to his own conduct, by what he, himself, said or did. The indictment charges a conspiracy among the named defendants and others who are unnamed in the indictment. A person cannot conspire with himself, and therefore you cannot find any defendant guilty of the

conspiracy unless you find beyond a reasonable doubt that he participated in the conspiracy 2 with at least one other purson, whether such 3 other person be one of the named defendants 1 or one of the unnamed others. If and when it 5 appears from the evidence that a conspiracy 6 existed, and that the defendants or any one 7 of them was one of the members, then the acts 8 themeafter knowingly done and the statements 9 thereafter imcwingly made by any person like-10 wise found by you to be a member, and while he 11 is a mombor, maybe considered by you as 12 evidence in the case as to the nember defendants 13 or defendant, even though the acts and state-14 ments may have occurred in the absence and 15 without the knowledge of them or him, provided 16 the acts and statements were knowingly done 17 and rade during the continuance of the con-18 spiracy, and in furtherance of an object or 19 purpose of the conspiracy. Otherwise, any 20 act done or any admission or incriminatory 21 statement made outside of court by one person 22 may not be considered as evidence against any 23 person who was not present and heard the 24 statement made. Therefore the acts or statements 25

of any conspirator, which were not in furtherance of the conspiracy or which were made
before its existence or after its termination,
may be considered as evidence only against
the person doing them or making them.

Now, in your consideration of the evidence in the case as to the charged offense of conspiracy, you should first determine thather or not the conspiracy existed as alleged in the indictment. If you conclude that the conspiracy did emist, than you next determine as to each defendant whether or not he willfully became a member of the conspiracy. If it appears beyond a reasonable doubt - I will use that term from time to time and later on I will define it for you -- it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed and that a particular defendant willfully became a member of the conspiracy, either at its inception or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more of the overt acts, which I read to you, namely, one or more of the

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Seven acts which were listed at the end of
Count 1 in the indictment, in furtherance of
some object or purpose of the conspiracy,
then there may be a conviction even though
the conspirators may not have succeeded in
accomplishing their common object or purpose
and, in fact, may have failed in so doing.
The extent of any defendant's participation
moreover is not determinative of his guilt
or innecesse. A defendant may be convicted
as a conspirator even though he may have played
only a minor part in the conspiracy.

An overt act, which I have alluded to,

An overt act, which I have alluded to, is any act knowingly committed by one of the conspirators in an effort to effect or accountilish some object or purpose of the conspiracy. The evert act itself need not be criminal in mature if it is considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street or driving an automobile or using a telephone. It must, however, be an act which follows and tends toward the accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object

or purpose of the conspiracy charged in the indictment. There has been very properly many references to one requirement of Section 1955 of the Federal Criminal Code, that there be at least five participants. I tell you, however, that this number nor any other number other than two has no pertinency as to whether or not there was a conspiracy. The end result 7 or goal of the conspiracy must, however, have 8 been an illegal gambling operation having at 9 least five participants. For example, two 10 persons can violate Section 371 of the Federal 11 Criminal Code if the conspire that an illegal 12 cambling business is to come into existence 13 with at least five participants, which if it 14 did exist would violate Section 1955 of the 15 Federal Criminal Code. There are four essen-16 tial elements which are required to be proved 17 in order to establish the offense of conspiracy 18 as charged in the indictment. I have alluded 19 to some of them generally, but specifically 20 and firstly, it must be shown that the con-21 spiracy described in the indictment was 22 willfully formed and was existing at or about 23 the time alleged. Secondly, that the defendant,

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whose guilt you are considering, willfully became a perber of the conspiracy. Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged, and fourth, that such evert act was knowingly done in furtherance of some object or purpose of the conspiracy as charged. Now, if you should find beyond a reasonable doubt from the evidence in the cade that the existence of a conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete, and it is complete as to every person found by you to have been willfully a number of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

Now, as stated before, the burden is always upon the prosecution, the Government, to prove beyond a reasonable doubt every

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essential element of the crime charged, and the law never imposes upon the defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. While the indictment charges that the conspiracy existed from about September 1 to December 20, \* 1975, it is not essential that the Government prove that the conspiracy started or ended on or about these specific dates. It is sufficient if you find that in fact the conspiracy was formed and that it existed at or about the period set forth in the indictment, and that at least one of the overt acts was committed in furtherence thereof within that period, and at or about the time and place specified in the indictment.

Now, in addition to the conspiracy count in the indictment, which was Count 1. I will next deal with Count 2, which charges each of these five defendants with the actual substantive violation of Section 1955. Before I proceed to charge and explain the law with respect to the substantive offense charged in Count 2 of the indictment, I have a word of caution. When I discussed the conspiracy

count, which was Count 1. I instructed you if you first found the defendant to become a mamber of a conspiracy, you then and only then could consider acts and declarations of each co-conspirator as evidence against all who you found to have joined the conspiracy. This rule does not apply and should not be applied by you in your deliberation on this substantive count, "substantive" being a term that we tend to apply as apposed to a conspiracy, upon which I am going to instruct you. In considering this substantive count you are not to consider what others may have said or done. The substantive count may be established only by evidence of a defandant's own conduct. what he, himself, did or said. Thus when you are considering the substantive count, Count 2. any admission or incriminatory statement made or act done by one person may not be considered as evidence against another person, including a defendant, who was not present and did not hear the statement made or see the act done. Count 2 of the indictment reads: That

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continuously from September 1, 1975 through

December 20, 1975, in the Western District of
New York and elsewhere, Joseph A. Lombardo,
Donald A. DiCarlo, Richard Kelsey, Jack M.
Silverstein and Edward A. Cadzarnak, defendants
herein, unlawfully did conduct, finance, manage,
supervise, direct and can an illegal gambling
business in the form of an unlawful bookmaking
operation involving sporting evants which
violated Article 225 of the Panal Laws of the
State of New York, all of which is in violation
of Section 1955, Title 18, United States Code.

with regard to the conspiracy occurt, Count 1,

I fully discussed and instructed you with regard to Section 1935. Of course, that discussion
was directed to an emplanation of the unlawful
activity to which the claimed conspiracy was
allegedly directed, and because I am now
instructing you on the substantive charge,
which alleges each defendant actually violated
Section 1955, I will out of an excess of caution
again discuss that section with you, and Section
1955 of Title 18, United States Code, provides
in pertinent part: "Whoever conducts, finances,
manages, supervises, directs or owns all or

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part of an illegal gambling business shall
be punished as the law provides." An illegal
gambling business is defined in Section 1955
as being firstly one that is in violation of
the law of New York State in this instance
and, secondly, involves five or more persons
who conduct, finance, manage, supervise,
direct or own all or part of the business which
has been or remains in substantially continuous
operation for a period in excess of thirty
days or has a gross revenue of \$2000 in any
single day.

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offense under Section 1935, the following essential elements must be proved by the Government boyond a reasonable doubt: Firstly, that there was a gambling business in the form of a sports bookmaking operation being conducted in the Wastern District of New York. Second, that such gambling business was in violation of the laws of the State of New York. I have already told you that under New York State law bookmaking means advancing a gambling activity by unlawfully accepting bets from the public as a business, rather than in a casual

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or personal way, upon the outcome of future contingent events not under the bettor's control. that a person violates New York State law when he knowingly advances or profits from such unlawful gambling activity. Now, thirdly in the elements, that such gambling activity was in substantially continuous operation for a period in excess of thirty Cays or had a gross revenue of \$2000 in any one day and, again, the Covernment need not prove both of those, and it is sufficient if the Government proves either. If you find that bets placed in any single day in that time span totalled at least \$2000, that is sufficient upon which to base a finding that the business had a gross revenue in that amount on that date. If you find there was an illegal gambling business in substantially continuous operation in encess of thirty days, it does not matter whether the business made a profit or whether it lost money or whether in fact then it did have bets on any single day in excess of \$2000. The fourth element, that five or more persons were involved in the gambling operation as persons who conducted, financed, managed, supervised, directed

or owned all or part of the business. I have already defined for you what those terms mean. And fifth, as to any particular defendant, that he participated in this gambling business in at least one of the roles provided by the statute, that is, in conducting it, in financing it, in ranaging it, in supervising it, in directing it or in caning the whole or part of the business. To establish this element of the charge the Government must establish as to any particular defendant that his participation in the business was done with guilty knowledge and with criminal intent to violate the statute. Now, in order to find that any one of the defendants is guilty of violating Section 1985, you must find that at least five people did unlawfully -- I applogize for reciting this liteny, it is in the statute and important -- did unlawfully conduct, finance, manage, supervise, direct or own all or a part of an illegal gambling business in the form of an unlawful booknaking operation which violated the provisions of Article 225 of the Penal Law of the State of New York. In addition, you must find that at

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least five people were involved in the illegal gambling activity for a period of in excess of thirty days or at least five people were involved during any one day when the illegal gambling activity had a gross revenue of \$2000 or more. How, in this respect, in the absence of finding that at least five people were involved in an illegal gambling activity -- or illegal gambling ectivities I should say -- for a full thirty days or nove or at least five people were involved in the illegal gambling activities during any one day when the gross revenue amospead \$2000, none of the defendants could be found to have violated Section 1955. You have heard testimony that cortain individuals were engaged in activities such as taking bets over the telephones from betters, giving odds or the line on sporting events, keeping financial records, including bottom sheets, and transmitting pay and collect figures to others. If you find that these individuals rendered material assistance in the conduct of the gambling operation which is charged to the indictment, then you may find they were involved in the conducting of such gambling

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business and maybe included as part of the minimum five parsons whose activities are an essential element of the crime charged. The issue of whether or not they were so involved is a question of fact for you to decide. Counsel have discussed the existence of two saparate and independent businesses. If you find there is serit to what was said, that " there were really two, you cannot convict any individual defendant unless you find the business to which he was connected involved five or more persons. In other words, if you do find two separate or independent businesses existed but paither one involved five or more persons, as I have defined that term to you, You must acquit all of the defendants. However, if you do find two separate, independent businesses existed but only one involved five or more persons, you can convict only those defendants involved with that business, and You must acquit the defendants involved solely with the other business. If you find there were two groups, then you must determine whether or not this really was one business, and in such determination you can take into

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account all of the associations that you find between them to determine whether or not they were casual, whether or not they were intermittent, whether or not they were essential to the carrying on of the business. If they carried out whatever was done through a spirit of Griendship and it was not necessary for the carrying out of the other business that those services be provided, then of course the business or the association, whatever it was, would not add up to a single business. If you find, on the other hand, that one could not operate without the other, and there was some kind of an essential connection between the two in carrying out their function in this gambling business, then you may come to the other conclusion and find there was a single business.

There has been argument and evidence concerning whether the defendant DiCarlo was
in business for himself. Such a finding by
you would not necessarily foreclose your
finding that he also was a participant in the
other gambling operation. He could be an
independent businessman and a participant.
not by the same acts, but at the same time.

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Now, I had mentioned unlawfulness, and unlawful as regard to gambling is defined in the New York Penal Law as gambling not specifically authorized by law. You will note that in describing the elements of the crimes I have said that the defendants must have acted knowingly and intentionally, and this does not mean the defendants must have been aware that their condect was criminal or that it violated any law of the United States, it simply means that they must have known what they were doing, that they were acting voluntarily, deliberately or on purpose, and not because of mistake, accident, carelessness or other innocent reason. In determining the defendants' intent, and it is obviously impossible to look into their minds, however, intent and knowledge may be inferred from their own conduct, from their acts, from their statements and from all of the surrounding circumstances.

How, an unlawful act is done intentionally if it is done voluntarily and willfully, and with the specific intent to do something the law forbids, that is, with bad purpose either to discbey or disregard the law. Intent is

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the purpose or aim or state of mind with which a person acts or fails to act. Ordinarily it is reasonable to infer that a person intends the natural and probable consequences of his acts, knowingly done or knowingly omitted to he done. So in the absence of evidence in the case which leads you to a different or centrary conclusion, you may draw the inference and find that any person involved intended such natural and probable consequences as one standing in like circumstances and possessing like knowledge would reasonably have expected to result from any act knowingly done or knowingly admitted. An act or failure to act is knowingly done if it is done voluntarily and intentionally, and not because of mistake or accident or other innocent reason, as I have already noted. Intent may be proved by indirect or circumstantial evidence. As I have noted, it rarely can be established by any other means. Witnesses may see and hear and be able to give direct evidence of what a person does or fails to do, but there can be, of course, no eyewitness account of the state of mind with which acts were done or

omitted. What a person does or fails to do 1 may indicate to you either intent or lack of 2 intent to act or to fail to act. Now, unless 3 otherwise instructed, in determining any issue involving intent, you may consider all of the 5 facts and circumstances which are in evidence 6 in the case which may aid you in determining 7 state of mind. 8 We come now to the final count of the 9 10 11

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indictment, which is Count 3. This count of the indictment is directed only against one of the defendants who are named in the indictment, this being the defendant Joseph A. Lombardo, and I will quote Count 3: "That on or about Decamber 20, 1975, in the Western District of New York, Joseph A. Lombardo unlawfully did destroy certain property, namely, flash paper, in order to prevent its seizure before the said property could be seized by Special Agents Peter J. Sofia and John E. Gill, Jr. of the Federal Bursau of Investigation who were then and there duly authorized by law to search for and seize the said property, all of which was in violation of Section 2232 of Title 18, United States Code. " That section says in

pertinent part: "Whoever before, during or after scizure of any property by any person authorized to make searches and seizures, in order to prevent the seizure or securing of any goods, wares, or merchandise by any person. destroys the same, shall be guilty of an offense against the United States."

In order to find the defendant Joseph A. Lombardo guilty as charged in Count 3 of the indictment, you must be convinced beyond a reasonable doubt or each of the following elements: First, that he did in fact destroy certain property, paraly, flash paper, on or about December 20, 1975. Secondly, that his actions in destroying the flash paper occurred either before, during or after the seizure of the property by Special Agents Sofia and Gill. Third, that the Special Agents Sofia and Gill were authorized to make a search and seizure of certain property on Joseph A. Lombardo's person, in his automobile or at his residence. You are not, however, to consider whether the search warrants for defendant Lombardo's person and his automobile were valid. The legal validity of these documents is a question

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of law for me to decide, and it is not for your consideration. It is my instruction to you that the respective warrants were valid. Sofia and Gill were acting under proper authority in conducting the search and in attempting to make the seizure, and you must decide whether Lombardo knew or believed or reasonably should have known and believed that Sofia and Gill were so acting. Now, the fourth element, it must be shown and you must find that the defendant Lombardo's actions in burning the flash paper were done with the intent to prevent Sodia and Gill from securing and deizing it. New, intent in this regard, as in others, means only that the defendant Lorbardo acted voluntarily and not by accident, and at the time of his action that he knew or believed or reasonably ought to have known or believed that a search and seizure was about to occur and, as I already told you, you ordinarily cannot prove it directly. There is no way of fatheming or scrutinizing the operation of the human mind, but you are entitled to infer the defendant's intent from the surrounding circumstances, and you can consider any

statement or act made or done or omitted by defendant Lombardo, and all of the other facts and circumstances in evidence which indicate his state of mind. It is ordinarily reasonable to infer that a person intends, as I have said before, the natural and probable consequences of acts knowingly done or knowingly omitted. You must remember that Count 3 charges only Joseph A. Louhardo with this offense against the United States. In addition, his alleged actions, which are charged in Count 3 of the indictment, are not included as any overt act consisted in furtherance of the conspiracy which is charged in Count 1. You must not consider any evidence offered solely in regard to Count 3 when you are considering Count 2 or Count 1 of the indictment or when you are considering the guilt or non-guilt of any other defendant. Government's Exhibit 119, for example, the pink box and the remainder of the piece of what Mr. Duncan said was flash paper, is an example of such evidence. How, there are certain rules of law, some of which I have already mentioned, which are common to all criminal cases and which you must apply

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in reviewing the evidence which is before you. A basic rule in all criminal cases is that a defendant is presumed to be innocent, and that presumption of innoceace remains with each defendant throughout the trial and continues to exist until such time as each one of you is ccavinced beyond a reasonable doubt by legal and competent evidence that the defendant is guilty of the offense or the offenses charged. The burden or proof that a person is guilty beyond a reasonable doubt rests with the Government at all times, it never shifts to a defendant. In order to sustain its burden, the Government must present proof which is sufficiently strong to convince each of you of each defendant's guilt beyond a resecuable doubt. The requirement that the prosecution prove a defendant's guilt beyond a reasonable doubt extends to every element of a crime or crimes charged against the defendant. However, in determining whether the guilt of a defendant as to each and every essential element of the crime has been established beyond a reasonable doubt, you are not limited to the proof from the Government's witnesses. If you are

in the case, both the Government's and the defendants', of which there was in this case very little, or by the defendants' cross examination of the Government's witnesses that the evidence establishes guilt beyond a reasonable doubt, you may convict a defendant. On the other hand, if you have a reasonable doubt at any point with respect to guilt, you must acquit the defendant. You will, of course, separately weigh and determine the evidence as to such count of the indictment, that is, you will determine the guilt or innoceance of each defendant as to each count of the indictment, and indictment separately.

I mentioned measonable doubt. A reasonable doubt is a fair doubt which is based upon reason and upon common sense, and which arises from the state of the evidence. Now, of course, it is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt therefore is established if the evidence is such as you would be willing to rely upon and act upon in the most important of your own affairs. A defendant, however, is not to

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he convicted upon mere suspicion or conjecture. A resecuable doubt may arise not only from the evidence produced but also from a lack of evidence. Because the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has a right to rely upon the failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence and, as I have said, and I reiterate, a reasonable doubt may arise not only from the evidence produced but from a lack of evidence. Now, remember that a reasonable doubt is such a doubt as is based upon reason and as apposis to your powers of logic. It is a doubt which arises out of sortthing tangible in the evidence in the case or something lacking in the case. It must be distinguished from a doubt which might be based upon emotion, such as upon a whim or upon a fancy. If you feel uncertain and are not fully convinced that the defendant is guilty of the

crimes charged, and you believe you are acting in a reasonable manner, and you believe that a reasonable man or woman in any matter of like importance would hasitate to convict because of such a doubt as you have, that is a reasonable doubt, to the benefit of which the defendant is entitled. If you have such a doubt you must acquit. As I have stated, a reasonable doubt in your mind as to any essential element of the crime entitles the defendant to acquittal of the crime and count involved. However, the rule that the Government must prove every essential element of the crime beyond a reasonable doubt does not mean that you must believe the testimony of every Government witness as being true beyond a reasonable doubt or that every piece of evidence the Government has offered is true beyond a reasonable doubt. It only means that the credible evidence as weighed and found by you under my instructions, and as viewed as a whole, must establish every essential element of the crime and each defendants' guilt beyond a reasonable doubt.

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As the sole judges of the facts, you must determine which of the witnesses you will

believe, and what portion of their testimony you accept and what weight you attach to it. At times during the trial I sustained objections to questions without permitting the witness to answer or where an answer was made I may have instructed that it be stricken from the record and that you disregard it and dismiss it from your minds. You may not draw any inference from an unanswered question, nor may you consider testimony which has been stricken in reaching your decision. The law required that your decision be made solely upon the competent evidence before you, and such items as I have excluded from your consideration are not legally admissible and must not be considered. Under no circumstances should you be influenced by the number of witnesses the Government has called or by the number of documents received in evidence or by the length of this trial. It is the quality of the testimony and other evidence which counts, not the quantity.

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Each defendant is entitled to have his guilt or innocence as to each of the offenses charged determined from his own conduct and

he were being tried alone. The guilt or innecesses of any one defendant of any of the crimes charged should not influence your verdicts respecting the other defendants. You may find any one or more of the defendants guilty or not guilty. Nevertheless, you must relate the evidence only as to that defendant or those defendants toward whom it is received. In any event, you must determine the guilt of each defendant as to each separate charge by giving separate consideration to the evidence which applies to him as to each count.

There is evidence in the case that the defendant Silverstein and in one instance the defendant Owczarzak made certain statements.

Evidence relating to any statement or act claimed to have been rade or done by a defendant outside of court and after a crime has allegedly been committed should always be considered with caution and weighed with great care, and all such evidence in the case must convince you beyond a reasonable doubt that the statement or act was knowingly made or done.

A statement or act is knowingly made or

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done if it is done voluntarily and intentionally, and not because of mistake or accident or some other innocent reason. If the evidence in the case does not convince you beyond a reasonable doubt that a statement was made voluntarily or intentionally, you should disregard the statement entirely. On the other hand, if the evidence in the case shows you beyond a reasonable doubt that a statement was in fact made voluntarily and intentionally by a defendant, you may consider it as evidence in the case and against that defendant.

Now, I repeat that the defendant in an Aparican court is under no obligation to give any evidence whatsoever. You should not draw any inference from the failure of the defendant in this case to take the stand. A defendant has the right to go to you, the jury, on the contention that the evidence of the prosecution is insufficient to warrant his conviction under the rules of law which I have been outlining to you.

You also are the sole judges of the credibility, which is the believability of the witnesses, and the weight their testimony

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deserves. You should carefully scrutinize the testimony given, and the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness was worthy of belief. You bring to this task your own experience in your respective lives which has enabled you to varying degrees to decide whether someone is telling the truth. Judge each witness' intelligence, motive and state of mind, and demeanor and canner while he or she was on the stand. Judge also any relation such witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence. Of course, the mere fact that the testimony of a witness is inconsistent or that there are other discrepancies in such testimony does not mean that you must reject the witness' credibility. You must determine whether the inconsistency or discrepancies are a result of falsification of whether, on the other hand, it is the result of innocent miscalculation or inaccurate observation. If you find

material portion of his or her testimony, you may regard that portion which you find to be unbelievable or false or you may, if you desire, disregard the witness entire testimony. In evaluating credibility you will, of course, determine whether or not the testimony of a given witness is inherently improbable or contradictory with respect to any material fact by other evidence in this case. Now, also you will not find that a witness has lied if you find that the witness so testified out of mere mistake or inadvertance.

The rules of evidence ordinarily do not permit a witness to give opinions or conclusions but in exception to this rule exists as to those witnesses who we call expert witnesses. These are witnesses who by education and experience have become expert in some art, science, profession or calling, and they are entitled to state an opinion as to relevant and material matters in which they profess to be expert.

They may also state their reasons for the opinion. Mr. Duncan and Mr. Holmes were such witnesses in this case in their respective

received in evidence in this case and give to it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience or if you should conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion completely.

There are two types of evidence which you may properly employ in finding a defendant guilty or not guilty of an offense. Proof may consist of the testimony of those who witnessed a defendant's conduct and who have testified to that conduct in the course of the trial, and this be called direct evidence or eyewitness evidence. Although the Government may not be able to produce eyewitnesses to the conduct on which guilt depends, this does not mean that it cannot produce proof sufficient to support a verdict. You are permitted to draw from one fact the existence of another if reason and experience support the inference, that is to say, you may draw from facts which you find

to have been proven such reasonable inferences as seen justified by reason and logic in light of your can experience in life.

proof of a chain of circumstances pointing to the commission of an offense by an accused is called circumstantial evidence. You may consider and find that both types of evidence, direct and circumstantial, bear on the question of the innocense or guilt of the defendant. As a general rule the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant you be satisfied of his guilt beyond a reasonable doubt.

Tasically an inference which I have mentioned, is nothing more than a deduction or a conclusion, which reason and common sense lead you to draw from facts which have been proven. Any inference which you draw from the evidence must reasonably flow from the evidence, and must be based upon facts established by the evidence. Because a permissible inference in law must flow naturally from and be based upon facts established by the evidence, it follows that you may not base further inferences

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merely on inferences previously drawn, an inference cannot be drawn from another inference.

If in the course of your consideration of all of the evidence as to a defendant you find certain evidence admits equally of two inferences, one which supports innocence and one which supports guilt, you must accept the inference supporting innocence and reject the inference supporting guilt.

you are instructed as a matter of law that you are not to be influenced by the fact that the Government of the United States is a party to this action, for I charge you that the Covernment is to be considered the same as any other party, it has the role of being the presecutor in the case, and also its attorney, Mr. Endler, is to be considered as any other lawyer would be considered.

It is your duty merely to determine the guilt or innocence of each defendant, and you should not concern yourselves in any way with the punishment any defendant may receive if convicted because that is my concern and mine alone.

As I said, I am sending a copy of the

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indictment to the jury room with you for your reference, and it has been marked Court Exhibit A. Dear in mind, as I have said before, the indictment is not evidence. It is merely a device used in our courts whereby a defendant is advised of the charges which have been lodged against him. You should not consider it as proving or tending to prove anything whatseever. A separate crime of offense is charged against each of the defendants in each of Counts 1 and 2 of the indictment and against Mr. Lombar's in Count 3. Each offense and the swidence pertaining to it should be considered separately. The fact that you may find all or some of the accused guilty or innocent of one of the offenses charged should not control your verdict as to any other offense charged against any of the defendants. Your verdict as to the guilt or innocence of each of the defendants on each count of the indictment must be reached unanimously, with all twelve of you agreeing on the result. At any time during your deliberations you may return into court and report your verdict of guilty or not guilty as to any defendant

unanimously agreed. You can find fewer than all five of these defendants guilty of Count 1 or of Count 2, according to my instructions. Of course, only defendant Joseph Lombardo can be found guilty of Count 3.

mistaken as to the voice and other identification of defendant Richard Kelsey, and that such person was in fact his brother, James Kelsey, you must, a course, acquit defendant Richard Kelsey, but you will still separately decide the guilt or innocence of each other defendant, and you could consider that James Kelsey was a participant even though he will not, of course, be considering his guilt or innocence.

Now, finally, in the cath that each of you took at the time you were sworn in as members of the jury, you swore that each of you would well and truly try this issue joined in this case and a true verdict give therein according to the evidence so help you God. I suggest to you that if you follow that eath and you try the issued without combining your thinking

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with any emotion that you will arrive at a true and just verdict. It must be clear to you that ence you get into an emotional state. if you let bias or sympathy or prejudice interfere with your thinking, then you will not arrive at a true and just verdict. As you deliberate, ladies and gentlemen, please be careful to listen to the opinions of the other jurous, and ask for an opportunity to empress your own views. No one juror holds center stage in the jury room, and no one juror controls or monopolizes the deliberations. If after listening to the other javors, and if after stating your own views, you become convinced that your view is wrong, do not hesitate because of stubbornness or pride of opinion to change your view. On the other hand, do not surrender your honest conviction solely because you are outnumbered.

As I have said, your verdicts must be unanimous, they must represent the absolute conviction of each one of you, and I shall ask for your verdict as to each defendant on each count.

As you retire to your deliberations, as

the first order of business you should select one of your number to speak for you when you return into court or when you otherwise have to communicate with me. All communication from your deliberation room will be by a note that you will hand to the deputy marshal who will be on duty outside of your deliberation room, and he or she will see that it gets to me. Do not ask the deputy marshal any questions concerning your duties. By means of a note you can ask me questions, you can request a clarification of my instructions on the law or a reading of my instructions or all or part of the testimony of any witness. Use a note also to advise me when you have reached your verdicts, or in appropriate circumstances, when you find yourselves so deadlocked that you fail unanimity is impossible. Never tell me or anyone else how your voting stands at any time, except to say in open court that a verdict or verdicts have been reached unanimously.

Gentlemen, are there any exceptions or requests and, if so, do you want to be heard outside the presence of the jury?

Yes, your Honor.

ME. ENDLER:

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA.

Plaintiff.

-vs.-

Cr. 76-3

JOSEPH A. LOMBARDO, DONALD A. DICARLO a/k/a "TONY", RICHARD KELSEY, JACK M. SILVERSTEIN, EDWARD A. OWCZARZAK a/k/a "O-Z".

ORDER

Defendants.

Defendant Lombardo's February 19, 1976 motions for orders directing that any transcribed proceedings before the Grand Jury be provided to such defendant and that he be tried separate and apart from his co-defendants hereby are denied.

The motion, filed June 18, 1976, of defendants Helsey, Silverstein and Owczarzak for hearings regarding admissibility of certain electronic eavesdropping and suppression of tangible evidence and severance of Count III of the indictment hereby is denied. Decision on said defendants' notion for an "audibility hearing" is reserved, except that I will conduct such a hearing in such form and substance as I shall deem appropriate and that said hearing will commence at 4:30 p.m. on August 17, 1976.

The June 23, 1976 motion by defendant DiCarlo (which was orally embraced by defendant Owczarzak at the June 28, 1976 argument) for the striking of their aliases from the indictment is hereby granted and said indictment is hereby deemed reformed accordingly. The Government way allude to such aliases in its opening statement if the Covernment in good faith expects to prove the employment of such aliases by said defendants or their employment by others in referring to or addressing said defendants. Defendant DiCarlo's motion for severance or dismissal of Count III is hereby denied. His motion for a hearing concerning the seizure of a certain automobile is hereby denied without prejudice to its separate consideration and determination out of the context of the instant criminal proceeding. His motion for a hearing re and suppression of identification testimony is hereby denied without prejudice to its renewal as said defendant may deem appropriate during trial. Dis notions for a hearing re electronic eavesdropping evidence and for an 'audibility hearing' are hereby determined according to the above disposition of same motions by other defendants.

Dated: Buffalo, N.Y.

August 12, 1976

STATES DISTRICT COURT WISTERS DISTRICT OF HEN YORK

THE UNITED STATES OF A CARICA,

-vs.-

JUSEPH A. LGMBARDO, MOMALD A. DICARLO, RICHARD KELSHY, JACK M. SILVERSTEIU, SUMARD A. OMCCARMAR Cr. 76-3

MUCHANOURE:

and

ORDER

At the end of 13 & 1/2 days of trial (including jury selection and deliberations) a jury convicted all defendants of the charges specified in the indictment -- namely, conspiracy to violate 15 U.S.C. §1955, violation of 13 U.S.C. §1955 and (defendant Lombardo only) of 18 U.S.C. [1132. Defendants have roved for judgments of sequittal a.o.v., for a new trial under F.R.Cr.F. 33 or for a dismissal under F.R.Cr.F. 45(b). (To particulars have been set forth orally or in papers in support of the latter, raised for the first time.).

product of court-authorized wiretaps should have been suppressed as well as said defendant's admission to Soverment agents after he had told them that he wanted to remain silent until he had had an opportunity to consult an attorney and an exent's identification of said defendant's voice.

These contentions were respectively ruled upon, adversely to

said defendant, prior to the verdict. No persuasive reason is advanced for changing such rulings. Defendant Owesersak claims prejudice due to my refusal to sever Count III (wherein defendant Lombardo alone was charged with a violation of section 2232) from the trial of the recaining counts. This also was ruled on earlier by me with no reasons shown for any alteration of such decision. It is argued that the testirony was inconsistent but, if it was, its analysis and orientation was the jury's task and there is inadequate basis for disturbing that body's work result. Lastly, such defendant complains of the excusal of two of the original swelve jurors and the scatting in their respective places of the two alternate jurors. Original juror Mason had been excused after 7 % 1/2 days of trial in order that he right to forth on a pre-arranged vacation and alternate juror 1 rook his place. Following 3 & 1/2 additional trial days the Labor Day weakend was reached and, as of the Friday before that holiday, it was hale known to me and to counsel that criginal juror Gardner was jucy-bound to preside over a neeting of school bus drivers on the norming of Tuesday, September 7th. He was told by me at the end of Friday's session that it was hoped that he could find a way to be present as a member of the jury on Transday. At the time of convening the jury in the courtroom on Tuesday, jurer Gardner was not present and alternate juror Fem was put in his

place. The case then proceeded to surmations and instructions and deliberation, with further deliberation and verdicts on the following day. Defendant's complaint, basically, is that Fox was allowed to participate as a deliberating and voting juror. Defendants (who were exercising their preemptive challenges jointly) had used their single such challenge as to alternate jurors on one of the two such originally seated and Fox came into the box as the putative alternate juror #2 when defendants were bereft of any preemptive striking power. For wes employed in a part-time capacity by the United States Internal Revenue Service in a civil auditing capacity and was striving to gain a permanent appointment with the Service. To part of his duties directly or indirectly concerned criminal investigations or prosecutions and his answers unequivocally showed his lack of predisposition in this case. At a sidebar conference, defendant Owczarzak and the other defendants contended that Fox should be ousted for cause. I refused, the unchosen jurors were excused and the chosen foorteen (unsworn) were instructed to return the following murning. Defendant Owczarzak complains of the denial of the challenge for cause and of the scating of juror Mason when it was known to all that he was going on vacation at the end of the second trial week and of the seeding allowance to juror Gardner to make his own decision whether he would be present in court on the morning of

September 7th. Suffice to say, I had every expectancy when the jury was being selected that the verdicts (if any) would be rendered before Mason's scheduled vacation, and I had reasonable hope on Friday the 3rd (having had no advance knowledge or warning that he was to be involved in any meeting or event on the 7th) that Gardner would find means to be present on the morning of the 7th, and I had and have full confidence in juror Fox's complete lack of bias, prejudice or predisposition. The seating of Fox affords defendant Owczarzak insufficient ground for relief. His motions hereby are denied.

sufficiently states a crime, that section 1955 is unconstitutional, that Count III ought to have been severed, that the wiretap evidence should have been suppressed, that his wid-trial motions for mistrial should have been granted, that For ought to have been dismissed for cause or not seated as a voting juror, that the verdict was contrary to the weight of the evidence and not supported by substantial evidence, that I erred in admitting certain (unspecified) evidence and that I refused to charge that a mere employee could not be found to be one who conducted the gambling business. His motions for an arrest and setting aside of the verdicts and for a dismissal of the indictment or for a new trial are hereby denied.

Defendants Kelsey and Silverstein joined in the notions of defendant Owczarzak and such are hereby denied as to them.

Defendant Lombardo asks for arrest of judgment and for judgment n.o.v. or for a new trial. His adoption of defendant DiCarlo's contentions gains him the same ruling as above set forth. Additionally, he broadsidedly asserts that Article 225 of the New York State Penal Law is unconstitutional but I find no basis for such holding. He also contends that I erred in not severing Count III from the remaining counts for trial purposes. At first blush it appears totally untenable for this defendant, being the sole person charged in Count III, to claim prejudice or error through nonseverance. However, he claims, this joint trial barred him from calling defendant DiCarlo to the witness stand on behalf of defendant Lombardo because DiCarlo as a defendant could not be compelled to take the witness stand in a trial in which he himself was a defendant. Lordardo must be arguing that he would have been able to have idCarlo's testimony in a separate trial of Count III (DiCarlo's availability would have been no different on the trials of the other two counts of which all defendants stood charged); but there is no showing, by argument or offer, what pertinent testimony DiCarlo could give concerning Lombardo's alleged destruction of gambling records as a Covernment agent was sacking to

execute a search warrant. Lombardo at the time and place was completely isolated from DiCarlo and was by himself in his personal automobile. Defendant Lombardo's motions also hereby are denied.

Dated: Buffalo, M.Y. October 8, 1976

.s.b.J.

1 MR. JAY: No, sir. 2 MR. BOREANAZ: None. 3 MR. NE MOYER: No, Judge. MR. JAY: I haven't seen that, but --4 All right, thank you, Mr. Schaller. Ladies 5 THE COURT: and gentlemen, we are going to adjourn for 6 today. We are actually going to adjourn into 7 one o'clock on Tuesday because of commitments 8 that I have all day Monday and on Tuesday 9 morning. Now, Mr. Mason, at the time of the 10 voir dire, you had indicated that you were 11 planning to start a vacation Monday, are those 12 13 plans still set? 14 Yes, sir. MR. MASON: I told you at the outset that I would protect 15 THE COURT: you in that situation. You will be free to 16 go on that, and assuming, as I now do, that 17 you would not be appearing here at one o'clock 18 on Tuesday the 31st, I will at that time, 19 assuming Mrs. Brydalski is present, at that 20 time move Mrs. Brydalski as the first alternate 21 in your position as Juror Number Seven. Mr. 22 Walsh handed me a note that somewhat surprises 23 me, it may be my own inadvertence, but Mrs. 24

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Grobe, you indicated that you are planning a

vacation I think?

MRS . GROBE:

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Yes.

THE COURT:

All right. I will see you all at one o'clock, except for Mr. Mason, on Tuesday. I would like to know whether or not it would conflict with anyone's personal plans if I ran until five or six on that day? We will start at one and quit -- I have been quitting at four -- if it runs afoul of any personal plans, I will quit at four, otherwise I would like to get the extra time in if I can. All right, we will start at one, and the present plans are that I will go to not later than six o'clock. Agair, this is one of those longer recesses, and it is more important that you remember my general admonition. Keep your minds open on all of the issues, while you are trying to retain whatever recollection that is possible in this type of case of the evidence that you have been hearing, and do not talk about it among yourselves or, most importantly, do not talk to anyone else, and if anyone tries to talk with any one of you, make sure I find out about it right away. I will see you on Tuesday at one o'clock.

there connected to any of the defendants that should be allowed in to evidence.

MR. NE MOYER:

There was something that could be traced on that day, and apparently they didn't trace it. The indication is there was a gun there. I would think they would trace ownership of anything like that.

MR. ENDLER: Do you want to have that in here?

MR. NE MOYER: I think you ought to have it in here.

MR. JAY: I have one other item that appears to be

I have one other item that appears to be imminent. In the selection of this jury we exercised, I believe, all of our pre-emptory challenges and some others that was given to us by the Court. It appears now that one of our jurors is going to be excused and replaced with an alternate. The alternate — of course, we only had one challenge for the two alternates — it appears to me that the fact that this juror was going to be gone within two weeks, and it was known to all at the time, as a matter of fact, I believe the juror, himself, indicated that to the Court prior to the start

of jury selection, and I believe also that the

time frame of this trial was elicited by the

Court from Mr. Endler, at least as the Government's

1		case, and it was his indication that it would
2		be at least a three week trial, and we are
3		at the end of the second week and we are losing
4		one of our jurors. It seems to me
5	THE COURT:	I don't concur with your recollection of Mr.
6		Endler having said that, although I assume he
7		may have been open ended on the matter at the
8		best.
9	MR. JAY:	In any event, I don't think that there was any
10		promise
11	THE COURT:	I will go along, certainly it was envisioned,
12		the possibility of going beyond a day was
13		certainly envisioned as a possibility by me.
14	MR. JAY:	Yes, sir. And I think to protect the record,
15		on behalf of my client, I must object at this
16		point.
17	THE COURT:	You all have objected to it. You are relating
18		to the original Alternate Number 2, who if Mr.
19		Mason is not here at one o'clock on Tuesday
20		will thereby become Alternate Number 1. You
21		all objected at the time he was seated, and
22		there was a request for additional alternates,
23		and I declined to allow that. You are on the
24		record on it already.
25	MR. JAY:	My objection doesn't necessarily go to the

1		alternates, it goes to fla factor that our
2		original jury, which was selected and sworn,
3		our jury was known, it appears, at the time it
4		was sworn that this would not be the jury
5		that would hear this case, that would actually
6		deliberate this case. That is what I object
7		to, not necessarily the qualifications or the
8		propriety of any of the alternates. But this
9		jury it was known at the time of the swearing
10		was not going to sit on this case, and that is
11		my objection.
12	THE COURT:	All right, Mr. Jay. Anything further?
13	MR. NE MOYER:	Your Honor, if Juror Number 2 ever sits, I
14		would consider that devistating.
15	THE COURT:	You mean present Alternate Number 2, Mr. Fox?
16	MR. NE MOYER:	I understand he is in the same building with
17		the FBI. He is an aspiring federal employee
18		with the Internal Revenue Service. I think
19		it would be grossly unfair if it came to pass
20		that he would sit.
21	THE COURT:	Well, as I say, the record is protected by all
22		of you in that regard.
23	MR. NE MOYER:	Thank you, Judge.
24	THE COURT:	Nothing more? All right.

(Thereupon the court was in recess at 4:15 P.M.)

THE COURT:

that would probably be all right. The first day is usually handing cut the material.

All right. That gives me a grasp of the situation then. I will see what we are going to do on it. You can walk right out here and go out to the hall and go down the stairway or the elevator. I will be calling you upstairs soon.

PROCEEDINGS RESUMED, FURSUANT TO RECESS, COMMENCING AT 1:15 P.M.

(Defendants present, counsel present, jury
absent.)

THE COURT:

As I got back from lunch, gentlemen, I was apprised of a juror problem which I did not know the magnitude of, and it involves Mr. Gardner, who is Juror #1, and I had known pretty much from the outset because he had come to me at the time we had the jurors come in and indicated that he had a position of responsibility in Lancaster concerning school bussing, and he was in the process of revamping

1 all the routes completely and it necessitates a lot of time on his part, and I told him that 2 3 I thought we would be able to work that out during his jury service. He has not been able 4 to do it. Now, of course, he faces the opening 5 of school on Wednesday, the 8th. He says that 6 he has a meeting of his forty-four regular 7 drivers, and about ten additional drivers. 8 I get this from having had him in my chambers 9 just now with myself and with Mr. Noel. He 10 apprises me that he has a meeting of all these 11 man set up, men and woman, I assume -- set up 12 for nine o'clock on Tuesday morning, and the 13 meeting would go, he anticipates, until eleven 14 or eleven thirty. He says he is responsible 15 for briefing them not only on the new routes, 16 he teels me in addition they have some system 17 of passes and a couple of other such involvements 18 that he feels makes it highly necessary that 19 he be there if he possibly can. Of course, I 20 gave no indication at that juncture. At the 21 same time I had in chambers, also on the record, 22 I had Alternate #1, Mr. Fox, who similarly has 23 a problem which involves his hope for getting 24 a full time appointment with the IRS. You 25

will remember he has a part time position there now. He has in the past undergone one "training program". The appointments to the full time positions are marit based or based anyway on going through three training sessions. You have a one upsmanship on somebody who has only gone through two, who has a one upsmanship on somebody who has gone only through one. So they have a training class which lasts three weeks which is -- I guess they have two of them getting underway, one is getting underway Tuesday morning, and the other is going to get underway Wednesday morning. He normally would go into the one on Tuesday morning. He can delay as long as Thursday morning on getting into it. That is the totality of the situation, and I find myself somewhat impressed with the hardship that Mr. Gardner presents, and without making any separate inquiry, and taking it on its face value, he has throughout indicated that he had a position of pretty much sole responsibility, as far as the school bus transportation is concerned for his particular school district. Now, there are two things involved, and I, from my part, I put aside the

MR. DOYLE:

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pact that was made earlier at the conclusion of the selection of the jury, upon the supposed bias or other lack of qualifications of Alternate #1, Mr. Fox, and nevertheless I do know that contentions were made by defense counsel against his sitting, I remember particularly Mr. Jay, and I mentioned that. We lost one juror and have taken our initial Number One and put her in place of Juror #7, Mr. Mason, who we knew at the outset was going on vacation beginning on the 30th. So I would like to hear any suggestions that any of you have to put to me, while I make up my mind on the situation. Your Honor, I certainly would not oppose excusing Alternate #1 if it came down. I don't know what course others would take, but I would rather go with eleven people on the jury than have him in. I would be less than candid with the Court if

I didn't say I was enormously concerned with Alternate #1. I'm sure the Court recalls that I asked for extra challenges, I challenged for cause, and I can only at this time parrot Mr. Ne Moyer's concern expressed when we excused Alternate #1 some time ago, that the

other alternate who indicated that he could not be fair in sitting on a case involving the IRS because of the nature of his personal feelings about it, and his feelings about tax fraud cases, et catera. All of that just signals to me that Alternate #1 is a disaster sitting. If he is into a time press getting into some school that is going to further his career with the United States Government, I can't help but question his ability to at that point impartially judge and determine with that kind of deadline on him. I am enormously concerned about Number One, I would rather go with eleven.

THE COURT:

Mr. Jay?

MR. JAY: 16

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Your Honor, we are entitled to go with twelve,

that was my point initially.

18 THE COURT: All right, let's not go over it. Do you have

anything from that point?

MR. JAY:

No. sir.

THE COURT:

All right. Mr. NeMoyer, you have already

expressed your view. Mr. Naples, while Mr.

Boreanaz is consulting?

MR. NAPLES: 24

Your Honor, as we do, the only choice to go

with twelve, is to use the alternate that is

1		left, I would much prefer to go with eleven.
2	THE COURT:	Mr. Boreanaz?
3	MR. ECREANAZ:	Judge, I can't add much, except to say that
4		after consultation with my client, I would
5		oppose the excusal of either juror.
6	THE COURT:	Mr. Endler?
7	MR. ENDLER:	Your Honor, as far as going with a jury of
8		eleven or anything less than twelve, I am not
9		authorized to make any representation as to
10		that to you. I am wondering, your Honor, if
11		there is any alternative. Mr. Boreanaz has a
12		potential problem. I wonder if we might not
13		consider somehow not going Tuesday morning.
14		and Mr. Gardner would be able to fulfill his
15		obligation. If we were a little more flexible
16		in the trial demands we were making maybe we
17		could go with the original twelve. I don't
18		know what Mr. Gardner's situation is.
19	THE COURT:	The only availability I would think would be
20		to not do anything on Tuesday morning and to
21		get into the afternoon, which means we would
22		have to be really summing up and charging on
23		that day, which would certainly carry them
24		into six thirty or seven o'clock by the time
25		they had received the Court's instructions.

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They could, of course, have what necessarily would be only preliminary deliberations on that evening and come back on Wednesday morning and do what they can during the day on Wednesday. Of course, pieced in with that might be doing what I indicated I did not want to do, and what I think the Government would oppose, and that would be splitting up the summations and having the Government get into its summation today, and having a hiatus between the Government's summation and the defense counsel's summations and whatever rebuttal the Government has, and the charge, which would get it into the jury a lot faster on Tuesday. Do you have a position on that, Mr. Endler?

MR. ENDLER:

Frankly, your Honor, my obvious objection would be splitting it up. My other objection would be, frankly, I am not prepared at the present time to close, I am not prepared to give my closing. I am wondering, your Honor, if at this time — I know the Court has other pressing demands next week of its own, which of necessity might curtail the jury selections to a point where they have not fulfilled them.

1		Whether we have an alternative I know that
2		I at least don't want to do it there is
3		an alternative in adjourning for a week and
4		maybe aleviating all problems that way, and
5		not holding anyone late, and having no problem
6		as far as any possible curtailment of delibera-
7		tions, and having the closings, charge and
8		deliberations the week after. It is just
9		another alternative that possibly could be
10		used to preserve our twelve.
11	THE COURT:	Are you still on, as far as the current
12		situation, Mr. Boreanaz? You are still on in
13		Rochester, Mr. Boreanaz, you personally?
14	MR. BOREANAZ:	I have made arrangements to have someone else.
15		I can change those back again. I have made
16		arrangements.
17	THE COURT:	You probably would like to be there on that
18		motion?
19	MR. BOREANAZ:	I would. I have made arrangements to have
20		someone else appear for me.
21	MR. DOYLE:	As an alternative to Alternate #1, I accept
22		any suggestion, even of the prosecutor, up
23		to and including the last, but certainly the
24		week, no problem with that.
25	MR. NE MOYER:	I have no objection to what Mr. Endler proposes.

THE COURT:

All right, get the jury up, I will stew on it.

(Thereupon the jury entered the courtroom at

WILLIAM L. HOLMES, called as a witness on behalf of the Government, and having been previously duly sworn, resumed and testified further as follows:

CROSS EXAMINATION BY MR. DOYLE (Cont'd.):

1:30 P.M.)

- Q. I just want to make sure I have given you everything back.

  That is the material basically -- it might be in a different order -- that you turned over to us before the luncheon break?
- A. Yes, sir, it appears to be all here.
- Q. Ohay. Mr. Holmes, aside from those notes and the transcripts, et cetera, and the tapes you have told us about that you listened to, is there anything else that you used to arrive at some of the opinions that you have given here over the last day or so?
- A. No, sir.
- Q. So that we get things in proper perspective, I think you have certainly told us, sir, and made it clear that you played no part in this investigation, isn't that right?
- A. That is correct.

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keep things out and cross examining and going into details, which are necessary to the case, and each lawyer is doing his best possible job that he can for his respective client. As a result, we have come to this point where a week later we have ended the Government's case. I have been assured by attorneys for the defendants that while most of them have some evidence, I think maybe each has some evidence at this point, they are not bound by what is said, of course, but each at the point gives me some indication that there will be a brief amount of evidence put in on behalf of each, the totality of which should not be more than a half day, but then again you never know. Now, I have not polled the jury to find out what the individual jurors availability and situations are, except the attorneys know this, of course, I have become aware of certain problems that Mr. Gardner has, Juror #1, on the morning of Tuesday the 7th, and have become aware of certain problems that Alternate #1, Mr. Fox, has on that day and the following day, but these do not, he tells me, become insurmountable until he reaches the fourth day of next week,

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namely, the 9th. There is a possibility perhaps of having a week's adjournment in this case, but I decided that that is not a healthy situation in a case of this complexity and magnitude. It is going to be difficult even with the capable summations of attorneys to get all of this pulled together in your mind so that you, pursuant to my instructions, can properly deliberate. If we let a week go by, a week plus two weekends, it would have to off until the 14th, and that would be impossible, in my mind. So I have decided that while we must close off now, that we will do so only until nine o'clock on Tuesday morning, the 7th. Come in at that time. Mr. Gardner, if your situation changes, fine, I will be delighted to see you here. If you find that you are in exactly the same situation that you have elaborated to me, and it is unchanged, then I will recognize that you cannot be here. Mr. Fox, in spite of what you told me, you will be here that morning, and if Mr. Gardner is not here. I am going to have to put you in his place in the box. I will expect each of the other jurors here at that time, at nine,

and it should be that we would complete the 1 evidence on that morning, and then in the 2 afternoon proceed to the summations of counsel 3 and to my instructions, which unfortunately 4 all of this I know is going to take us to 5 probably somewhere in the area of five thirty 6 to six thirty at night on Tuesday, and at 7 that time the case could be handed to you and, 8 subject to your own decision on it, you would 9 then be holding as a group, with someone 10 selected to speak for you, subject to your 11 own decision, and it would be my suggestion 12 that you with or without going to dinner that 13 evening get into some preliminary deliberations 14 on the case. That is my own thinking, but, 15 again, you are the ones that are going to 16 decide both the case and your determination. 17 My only expectancy is that this case cannot be 18 fully determined and resolved by you in one 19 evening's sitting starting that late, so that 20 at some appropriate time, again subject to 21 what you tell me, we would disband for the 22 evening and come back on the next morning, and 23 Wednesday, this would be the 8th, when you 24 would continue your deliberations and hopefully 25

1 All right. THE COURT: 2 Thank you. MR. NE MOYER: Bring up the jury. 3 THE COURT: After resting, could we deem it as though the 4 MR. BOREAMAZ: motions were all renewed so as to save time, 5 and I assume the rulings would be the same? 6 Yes, they would. 7 THE COURT: 8 (Thereupon the jury entered the courtroom at 9 11:35 A.M. Juror #1 absent.) 10 11 All right. Mr. Gardner is not here, he was 12 THE COURT: Juror #1. Mr. Fox, you were Alternate #1, 13 you are now seated as Juror #1. We have 14 been occupied with various matters this 15 morning, and one of the things concerned the 16 receipt of certain exhibits, certain additional 17 exhibits. I have received Exhibit 223. I 18 have received Exhibits 133 through 138. I 19 have received one item of what was Exhibit 20 141, and this one item comprises one 141 in 21 its totality. I have received 218, and I 22 have received a portion of what originally 23

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WESTERN DISTRICT OF NEW YORK

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had been marked as 142. The Government originall

had offered that, there were three plastic

- The Buffalo office.
- In that same period, sir, did you have occasion to be 2
- involved in the investigation of an illegal gambling 3
- 4 business?

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- 5 Yes, sir. A .
- And sir, are you familiar with the term "case agent"? 6
- 7 Yes, sir. A.
- And at least for the purpose of this investigation were 8 you what is known as the case agent? 9
- 10 Yes, sir. A.
- Q. And were there other personnel in the FBI, other agents, 11 working under your direction in this case?
- That is correct. 13
- Q. Sir, during this case, among other cases, did you have 14 occasion to conduct physical surveillance? 15
- Yes, sir, I did. 16 A .
- Can you tell us, sir, if you can recollect when was the 17 first occasion with regard to this case? 18
- I can't be sure, but I believe October 15, 1975. 19 A.
  - On October 15th can you tell us what you had occasion to Q. physically surveil, what you observed?
    - Yes, sir. I observed Edward Owczarzak meet with Richard A. Kelsey in the parking lot of the Como Park Mall. The two drove their respective vehicles, Edward Owczarzak in an Oldsmobile convertible, license plate 432-EUD, drove this

Wehicle over, stopped in the immediate vicinity of Richard Relsey, who was driving a blue Chevrolet, license 122-EVI. They paused for several moments, and I observed something being passed between the two vehicles. Shortly after that both vehicles left the mall area, proceeding north on Union Road. I continued the surveillance of Edward Owczarzak, who travelled by way of the New York State Thruway, Millersport Highway, into the vicinity of the Amherst Manor Apartments, 1525 Millersport Highway.

- Q. Sir, prior to seeing Mr. Ouczarzak at the Como Mall, had you observed him carlier in that day somewhere else?
- 12 A. No, sir, not myself personally.
- 13 Q. And the Br. Owererzak that you observed on October 15th,
  14 is he in the courtroom today, sir?
- 15 A. Yes, sir, he is.

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- 16 Q. If he is, could you point him out?
- 17 A. The gentleman that just stood up.
- 18 MR. ENDIER: Let the record reflect that the witness has
  19 identified the defendant, Mr. Owczarzak.
- 20 BY MR. ENDLER:
- 21 Q. The Mr. Kelsey that you observed on October 15th, is he 22 in the courtroom today, sir?
- 23 A. Yes, sir.

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- Q. And if he is, could you point him out?
- 25 A. The gentleman that just stood up.

# FEDERAL BUREAU OF INVESTIGATION

Date of transcription 10/17/75

Physical Surveillance of EDWARD A. OWCZARZAK
76 Williamstowne Court North
Cheektowaga, New York
October 15, 1975

P4:30 PM

Surveillance instituted in the vicinity of captioned address. A black convertible top over gold Oldsmobile Cutlass bearing New York State License (NYSL) 432 EUD is observed parked in the vicinity of captioned address.

13 5:45 PM

A white male believed to be EDWARD A. OWCZARZAK exits 76 Williamstowne Court North, enters above-described vehicle and departs the area.

D.P. 48 PM

Above vehicle is observed to enter the Como Mall parking lot, Como Park Boulevard and Union Road. This vehicle stops in the vicinity of the Hens & Kelley Department Store. The driver is observed to roll down the window. RICHARD KELSEY, driving a blue Chevrolet Chevelle bearing MYSL 122 EVI, is observed to drive alongside of the above Oldsmobile Cutlass. KELSEY rolls down the driver's side window and stops his vehicle so that both drivers are facing each other. The above two individuals are observed to engage in conversation. KELSEY is seen extending his hand from his vehicle and taking something from the subject.

\$ £ 50 PM

KELSEY, in the above blue Chevelle, departs the Como Mall, proceeding north on Union Road. The subject then exits the mall area, proceeding north on Union Road.

5 6:07 PM

The subject is observed to proceed north on Millersport Highway through the intersection of Millersport and Haple Road. He turns east into the entryway of the Amherst Manor Apartments, 1525 Millersport Highway, Amherst, Mew York. The subject proceeds in his vehicle to the extreme

	10/15/75	Buffalo,	New York	File # Buffalo 182-791
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	SAS JOHN C. POERSIJE JOSEPH M. SCIACCA/J	2 and	٠٤٠ :	10/17/75
	JOSEPH M. SCIACCY/J	CP; dam	Date dictated	
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document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is losned to your agency; and its contents are not to be distributed outside your agency.

BU 182-791

6:07 PM eastern end of the complex and then returns to (Cont.) Millersport Highway and exits the area.

After proceeding north on Millersport Highway, subject turns east onto a driveway into the subject turns east onto a driveway into the Audobon Amherst Recreation Center, 1615 Millersport Highway, Amherst, Maw York. Subject proceeds around a circular driveway, then exits the driveway onto Millersport Highway.

Subject then returns to the Amherst Manor Apartment complex and parks his vehicle benind the first apartment building to the north of the entrance way.

89 6:30 PM Surveillance discontinued. No further activity noted.

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Buffalo, N.Y. ELFVIN, J. October 18, 1976

Cr. 76-3 JOSEPH A. LOMBARDO

APPEARANCES:

RICHARD J. ARCARA, ESQ., United States Attorney, by RICHARD ENDLER, ESQ., ... Department of Justice, Appearing on behalf of the Government

GEORGE P. DOYLE, ESQ., Appearing on behalf of the Defendant.

CLERK:

Sor sentence, Criminal 76-3, United

States versus Joseph Lombardo.

Mr. Doyle, you have had an opportunity THE COURT:

to read the presentence report?

Yes, your Honor. MR. DOYLE:

And is there anything of any material THE COURT:

conflict or departure from the truth therein?

Well, your Honor, not on the probation MR. DOYLE:

report. I would say the only point we would

take issue with are with respect to some

comments made by the now divorced wife of

Mr. Lombardo which I think --

Well, they get no particular mileage THE COURT:

with me.

Fine, your Honor. I note the only MR. DOYLE:

item that the Probation Department had an

allegations, they were able to put the lie to her by their own investigation. With respect to the document just shown to me by Mr. Endler, with respect to some of his construction of the evidence, et cetera, and some of the guesswork and surmise in there, particularly with respect to Mr.

Owczarzak, obviously we take issue with those, and I think the Court has heard all of the evidence that was properly adduced at this trial and can easily separate the wheat from the chaff in that regard.

THE COURT: Do you have anything you want to say on your own behalf, Mr. Lombardo?

16 DEFENDANT: No. your Honor.

THE COURT: Do you have something further, Mr.

Doyle?

19 MR. DOYLE: I did, your Honor, but I certainly would
20 defer to Mr. Endler.

21 THE COURT: No, no.

22 MR. DOYLE: Respectfully, your Honor, I want to
23 be brief, as the Court is aware, we have
24 submitted basically a brochure in that hopes

that --

THE COURT:

I have that.

MR. DOYLE: 2

Fine.

THE COURT: 3

I have read it.

MR. DOYLE: A

Fine. If the Court would have an opportunity to look through that brochure, and while I think --

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THE COURT:

I read every letter in there.

MR. DOYLE:

Thank you, your Honor. Addition-Fine.

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ally, I think the factual matter that was set forth in the narrative portion at the beginning was pretty much one hundred percent in line with what the Probation Department had to say about it. I know that all of the matters are before the Court. To start out, briefly, on the sentence, by stating clearly to the Court that certainly, as an officer of this court, and as an attorney, I recognize that when Congress speaks in a specific area that obviously it binds us, it binds the Court, it binds all of the practitioners before the Court. I think the legislation was passed, your Honor, at a time when perhaps there was some emotional 277 . . . . stress, some emotional strain that was on Congress, I think perhaps even that the

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presumption that in some way legitimatizes that particular piece of legislation perhaps may well have been given some substantial challenge by the proof produced at this particular trial. I think, your Honor, in short, we certainly saw no vast interstate operation, which was certainly the direction of the Congress when they passed Section 1955 of Title 18. This at best, notwithstanding the substantial amount of monies that were bet on both sides, I think this was by any standard not the type of interstate operation that has so frequently concerned the federal government. I think also, your Honor, that notwithstanding some opinion testimony as to such people as Breeze, that he might have unwittingly, notwithstanding his denial on the stand, somehow have been deemed to be part of it. From all of the proof adduced at the trial, we were clearly talking about either a four or a five man operation, which is to say the least exactly on the margin, as far as the federal violation is concerned and, in fact your Honor, which I think was probably a

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source of reaffirmation for all practitioners and judges to note, the trial jury came back in after a night's deliberation and asked for December the 3rd to be read back, and that was the one day, and the one day only, I think, from a reading of those transcripts, your Honor, under any fair standard, that there was any indication that this fifth man was in fact placing some bets. All of the other indications, that he was betting differently, that he was making his own line, that he was accepting hockey wagers whereas nobody else would, would seem to have taken this entire operation out of the federal ambit, but that one December 3rd date that the jury very quickly and very accurately zeroed in on was obviously determinative, it was the only testimony they wanted read back. I merely wanted to point out, not in any way to suggest that because it was so close, therefore it should in any way be forgiven, it is against the law, and we all have to honor that, but at best it was a marginal operation. I wish to point out also, your Honor, that even from the bettors that were here, the community's common feeling

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WESTERN DISTRICT OF NEW YORK

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against gambling, perhaps historical feeling against gambling, has been that it somehow preys on the weak, and that is why it is a proper area for governmental concern. Certainly, the testimony that was adduced at this trial was almost a who's who of the people out in Amherst. The people that were called as the bettors were presidents and executive vice presidents of a very substantial corporations and many of them admitted that the money they bet on a weekly basis was, in effect, pocket money, they bet it solely for the purpose of enhancing their enjoyment of watching the games on television, and I think at least a couple of the bettors I talked about, because I think we all have a feeling that gambling can turn nasty or can get bad, any of these bettors that we talked about said this never occurred, if there was any time needed there was no hint of violence, something they entered into freely and voluntarily. I say all of this not to in any way suggest to this Court that it should reject the mandate of Congress in this case and say, 'Although we perhaps agree that apparently nobody was harmed, there was

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no hint of any sort of loan sharking or anything that we would commonly think might be connected with this, and therefore activity along this line is justified somehow.' I am not saying that, your Honor. I am not asking you to accept that position. I am asking you, however, to consider those factors in mitigation of sentence. Mr. Lombardo stands before you, obviously convicted by a jury of his peers. He stands ready to accept that judgment and the judgment of the Court. He asks only that you consider, and he has mentioned this to me, that during the course of this trial it has become apparent to him that he could not continue to expose his family and the children, which I think the Court has learned of during the course of these two probation reports, one from our office and one from the Probation Department, he can't continue to expose his family to that type of life. He assures me today as he stands here that he has no part of any operation and intends to have no part in it. This trial has made that perfectly clear to him, he cannot continue to expose his family to obviously the sanctions of

society for this type of activity. I do ask your Honor in passing sentence that you take into consideration respectfully the fact that the man has never been convicted of a crime prior to today.

THE COURT:

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I am aware of that.

MR. DOYLE:

He has an absolutely clean record in that regard. I also ask your Honor, and I understand with respect to some of the other defend ants it was somewhat different, Mr. Lombardo, and I think it has been verified by the Probation Department, has sought legal and proper employ ment in at least two separate activities, and part time in a third, that he is working actively at them, that he is valued by his employers in that regard, is working hard, he is attempt ing to keep his family together, and I think the Court is aware of the tragedies that have existed in that regard. It is with bringing to the Court the attention of those circumstances, Mr. Lombardo stands here ready for your sentence, your Honor, and asks the Court show whatever leniency and justice it can find in its heart.

THE COURT:

Mr. Lombardo, is there anything you want

to say on your own behalf?

DEFENDANT: No, he has said everything, your Honor.

THE COURT: Mr. Endler?

MR. ENDLER: Yes, your Honor. Your Honor, in our

presentence report to this Court, the Government made a recommendation as to each of the three counts on which Mr. Lombardo is convicted, that he be sentenced to the maximum allowable, and that such sentences run consecutively. I say this, your Honor, for all the reasons noted in the presentence report in addition, your Honor. I believe Mr. Doyle has noted correctly that Congress passed Section 1955, and it was aimed against the large scale gambling operation, as opposed to some lone individual on the street corner. I believe, your Honor, that the evidence we all heard shows that is exactly what we have, a large scale gambling operation, various locations, with as much as \$50,000 worth of gross gambling action on at least two of the occasions when there were electronic surveillances going. In addition, your Honor, although there have been no convictions, this is not Mr. Lombardo's first brush with the federal and state gambling

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WESTERN DISTRICT OF NEW YORK

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laws or his first appearance before a judge. Some four years ago he appeared in federal court on similar charges, your Honor. That case ended in a hung jury, and it was subsequently dismissed for the Government's failure to afford a speedy retrial. I don't believe, upon information and belief, I don't believe, your Honor, this defendant's appearance in this court for the four: weeks during August and September has taught him a lesson, your Honor. Your Honor, he made the statement through counsel that this conviction -- this case -- he is now going to lead an honest life and take up legitimate business enterprises. As of September, your Honor, while we were holding trial in this courtroom, at Number 688-8872 and 688-2267, this defendant was accepting wagers during this trial. The act of contrition that he has given here today by saying he has given it up, as your Honor noted a few minutes ago, is very easy when a person appears before a judge after conviction. Your Honor, these legitimate businesses that are noted in the presentence report, where he claims four to five thousand dollars worth of income, are a

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far cry from the \$100,000 that the FBI found in 1970, that an additional \$75,000, according to his wife, and I have not talked to her, I don't know how valid her statements are, was in Rochester, and the additional amount, which we will never know, that the FBI missed on December 22nd at the Marine Midland Bank, and the additional fact, your Honor, that on his income tax return there is some five or six thousand dollars reported as income. Your Honor, for all of these reasons, and all of the reasons set forth in the Government's recommendation and presentence report, the Government recommends that this defendant be sentenced to the maximum allowable. It would also ask your Honor that because of the information supplied that he isonotogiving up his illegal activities, that possibly within the last month he has continued to take bets illegally, that he be remanded to the custody of the Attorney General if your Honor sees fit to give a sentence of a period of incarceration, and that he is a danger to the community, your Honor, and that he cannot lead a law abiding life in the community of Buffalo. Thank you very much.

MR. DOYLE:

Excuse me, your Honor. Obviously, with respect to allegations, and particularly these allegations that, needless to say, sir, the first I have heard of them was in the lastive minutes, they are denied vigorously, and I would be happy to have Mr. Lombardo do that personally. I wish you would, Mr. Lombardo.

DEFENDANT:

I strongly deny any allegations that I'm doing anything illegal now, your Honor, anything at all. I am fully aware of the seriousness of this charge. I won't put my wife and children through any more of this. Mr. Endler is deadly wrong about it. I don't know what he is talking about.

MR. DOYLE:

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I think it is also, your Honor, I am sure, words that are chosen very carefully when a representative of the Justice Department says "possibly within the last month there has been some activity," I am sure if there was any, I feel certain if there was any information along that line that that would be brought out properly if he were engaging in such activity, certainly criminal charges would lie. If they could have come up with any information indicating this type of activity

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was continuing, what could be greater support for their position asking for absolute maximum punishment for a first time offender than to bring those charges and come forward with proof on those charges. This they have not done. This, I submit to the Court, they have not done because they cannot do it because it is non existing, and I can only add to Mr. Lombardo's firsthand denial of it what I consider would be a denial of logic. I resent it, and I particularly resent innuendo, and I think their recommendation and report was filled with it, including the comments on Mr. Owczarzak, and I ask the Court respectfully not to give much weight to that type of argumentation that is, respectfully, on surmise and guesswork. As far as referring to prior troubles with the law, your Honor, if our system of justice means anything, then acquittals and dismissals must not be taken as an indication of a violation of the principle that we tell every juror, the man is presumed innocent until proven guilty. The fact of the matter is that this man hasn't been convicted of a crime in his entire life, and he is now forty years of

age, this is his first offense.

THE COURT:

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Well, I am very aware of our system of law, and I do not condemn Mr. Lombardo for anything of which he hasn't been convicted, whether it be something where charges have been laid or where charges have not been laid, I pay no attention at all to any earlier times when he may have been before the court on charges where there has not been a conviction, and there has not been, nor anything that may be newly arisen, even if there be substance to it. I pay attention only to that of which he was found guilty here in federal court following the charges laid by a grand jury, and also I am very aware of the philosophy and purpose behind Section 1955, and I know that a lot of the thinking of Congress in enacting that section was to reach what has been called loosely or otherwise organized crime, thus the criterion that there be at least five individuals involved in the ownership, control, management, et cetera, of a gambling operation, and the requirement of duration or daily amount. Now, of course, Congress didn't write into Section 1955 that as any one of the elements, it didn t

say that in order to convict under 1955 you 1 have to find that Mafia or organized crime or 2 something that interrelates through the whole 3 United States, and basically have laid it out just in the essentials that we tried the case 5 on, and these were satisfactory to the jury. 6 Now, I do have in mind, however, that the proof 7 very adequately showed throughout the trial 8 that Mr. Lombardo was the person who was really 9 mainly operating this. I recognize that it was 10 very close to the line, as far as the number of 11 participants, and I know that the defense very 12 logically and ably was pitched along that line, 13 to show that too few people were involved in 14 this admitted gambling operation to bring it 15 within the purview of 1955. Nevertheless, the 16 jury has found to the contrary. These letters 17 that I have, and they are impressive letters, 18 some from people known to me, good standing in 19 the community, and they are impressive, and 20 I have given them close attention and great 21 weight, but a lot of what they come down to 22 is the same thing we had shown through the 23 trial from some of the witnesses, the betting 24 witnesses, who said that Mr. Lombardo was a 25

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"good bookie", one who could be trusted, one who carried out his business in a proper fashion and without ripoffs or running out of town or anything like that, and these character references are all along that same line, that Mr. Lombardo is someone who in whatever he is doing can be trusted, and is personable -- it doesn't say whether you are a good golfer or not, I know I'm not -- but this type of operation also calls for -- almost always calls for a head man, it calls for a funding, someone has got to have some cash around if someone is going to follow through on paying off, there has to be a resevoir of cash funds, and from what I could see of the testimony that came before me, it wasn't Mr. Silverstein or Mr. Kelsey or Mr. Owczarzak certainly who had that cash, and I would have to have a little bit of doubt as to the amount of cash that Mr. DiCarlo had, and, as a consequence, I have to believe from everything that I have seen in the case that really it was your business, you were the one who was calling the shots, you were the one who had the cash, you were the one that kept it going and made the decisions and was

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the organizer, and, consequently, as long as Congress has left out of 1955 any requirement of any showing that we see something extra or sinister lurking in the background, I have to go along with Congress in deciding that when . 1 the elements that are set forth in 1955 have been shown to the satisfaction of the jury, that we look at what Congress said should be the punishment. The courts have also said, and someone approaching it initially might come to a different conclusion, but obviously with the declaration of the Supreme Court of the United States, they have indicated that a conspiracy to accomplish the crime that is set forth in 1955 is a completely separate and separately punishable crime from 1955 itself. As I say, someone might reach a different conclusion if he were approaching it de novo, but the Supreme Court has said they are completely separate, supportably separate, and I have that in mind. Then, of course, there was the crime, the lesser crime, so to speak, as set forth in Count 3, where it was alleged and proved to the satisfaction of the jury that you had violated that particular section by

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destroying the records in the face of the FBI warrant, search warrant, for their seizure. Again, we have the three separate situations. You know at this point, of course, that I have handed out sentences to the other four individuals who were found guilty by the jury, and some of those have received periods of incarceration. I notice they have filed notices of appeal and it will be left to the determination of a higher court as to whether or not the convictions are valid, but hearking back to what I said before, that I can see from the evidence, looking at just this crime alone -these crimes alone -- and not worrying about past or not worrying about the allegations that Mr. Endler has put in the picture now, I have to view you as one who must reap the heavier sentence, the greater punishment on this crime, than the others with whom you were involved. So on that basis, I sentence you under Count 3 of the indictment to a period of one year in the custody of the Attorney General; and on Count 1 of the indictment, I sentence you to a period of two years in the custody of the Attorney General, that term of

the term I have imposed on Count 3; and on
Count 2, I impose a term of two years in the
custody of the Attorney General, those two years
to be served consecutively to those I have
imposed under Count 1, and in addition to the
two years in the custody of the Attorney
General under Count 2, I sentence you to a
further period of two years of probation and
I fine you \$20,000, the payment of which shall
be made a condition of the period of probation
to which I have sentenced you under Count 2.

MR. DOYLE: Your Honor, I have two sets of papers.

I wonder if I might address the Court on them.

Handing up to the clerk an original and rwo

copies of the notice of appeal, which I ask

that the Court instruct be filed.

THE COURT: All right, they will be filed.

CLERK: There is also a fee for filing.

MR. DOYLE: Your Honor, I also have a notice of

motion for bail pending appeal, and I am ready

to argue that now. I also have a bond here,

your Honor. Obviously, it will have to be

redrafted. So I am questioning if we could

argue it now or if we could have a stay of

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THE COURT:

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execution for forty-eight hours, I could make up the papers that I would submit on the notice of motion for the bail.

Do you want to argue now?

MR. ENDLER: Your Honor, I have just read the papers.

I would say I would be prepared now if Mr.

Doyle is prepared.

Fine. Your Honor, I point out that Mr. Lombardo simply -- first of all, the other four defendants are released on bail, that I think any fair appraisal of the probation report indicates that Mr. Lombardo has substantially greater ties to this community by way of family, children, et cetera, than any of the other four. I also point out to the Court that Mr. Lombardo is a lifelong resident of the area, he is employed regularly in at least two jobs and, as I say, has a third on a part time basis, that he has always been amenable to the process of this court. Knowing I think with virtual certainty the feeling of the Government with respect to this sentencing, and even after learning of the obvious incarceration that took place with respect to the other people, he obviously still is here in

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court, has always been in court, his wife is here, they have purchased a home. I think the likelihood of him fleeing under all the circumstances is virtually non existent. I might point out that the total sentence of the Court obviously is what his exposure would have been to on one count. He was fully aware of that at the time that he walked in. I would ask that he be released on bail, whatever the Court wishes to set, he can do it by way of recognizance or a bail bond.

Mr. Endler? THE COURT:

MR. ENDLER:

Your Honor, I would only note that I can't dispute that Mr. Lombardo has shown up on every appearance during these proceedings. I would ask, in view of the Court's sentencing, and what Mr. Doyle said before about this being a first conviction, and knowing that he now faces time in custody, that some sort of bail be imposed. At the present time he is out on a personal recognizance bond. The Government would recommend some sort of cash bond, perhaps in the amount of \$25,000 for security be posted while the appeal is pending. That would be dur recommendation to the Court, in view of the

serious consequences he now is faced with and never faced before in his life.

MR. DOYLE:

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Your Honor, again with respect to the certainty of the sentencing, I can personally attest to the fact that was known before we showed up today, not obviously by virtue of any complete ability to predict what you were going to do, but obviously the proof was that he was the leader of this, and we knew the sentence would fall more heavily on him. As I say, the total sentence is what he could have gotten on one count. We are ready, your Honor, to post whatever the Court asks. We have Mr. Bonfante standing by. I notice that the bail for the other defendants was in the amount of \$2500, and we are certainly ready to post that. I would ask the Court to consider that in lieu of the recognizance bond that always guaranteed his appearance prior to now.

THE COURT:

I will fix cash bail in the amount of \$10,000, and can that be posted tomorrow? I would allow him to have until tomorrow to post it and not be incarcerated in the meantime.

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MR. DOYLE: Fine, your Honor. I will make every attempt to raise that amount by tomorrow.

MR. ENDLER: 

Thank you, your Honor.

I hereby certify that this record is a true and accurate transcript from my

stenographic notes, in this prospeding.

Official Reporter U. & District Court

UNITED STATES COURT OF APPEALS SECOND CIRCUIT THE UNITED STATES OF AMERICA, Plaintiff-Appellee against AFFIDAVIT OF SERVICE JOSEPH A. LOMBARDO, Defendant-Appellant STATE OF NEW YORK) COUNTY OF ERIE CITY OF ERIE CONSTANCE L. OHLHUES, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1240 Delaware Avenue, Buffalo, New York. That on the 13th day of April, 1977, deponent served the within brief on appeal upon Howard Weintraub, Esq., Attorney for the United States of America in this action, at P. O. Box 899, Ben Franklin Station, Washington, D.C., the address designated by said attorney for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States post office department within the State of New York. Sworn to before me this 13th day of April, 1977. DOYLE & DENMAN ATTORNEYS AT LAW Linda Al Leorella LINDA D. FIORELLA COMMISSIONER OF DEEDS In and For the City of Buffalo, New York My Commission Expires Dec. 31, 19,7,8

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent

further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

INDIVIDUAL VERIFICATION

deponent is the read the foregoing the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the the corporation

named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because

is a corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of

19

STATE OF NEW YORK, COUNTY OF

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the upon

day of

of

19 deponent served the within

attorney(s) for

in this action, at

the address designated by said attorney(s)

for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York. Sworn to before me, this day of

#### NOTICE OF ENTRY

Sir: Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within

named court on

Dated,

Yours, etc.,

## DOYLE & DENMAN

#### ATTORNEYS FOR

OFFICE & POST OFFICE ADDRESS 10 ELLICOTT SQUARE COURT ELLICOTT SQUARE BUILDING BUFFALO, NEW YORK 14203 (716) 856-3486

To

Attorney for

NOTICE OF SETTLEMENT

Sir :- Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the

day of

19

at

Μ.

Dated,

Yours, etc.,

### DOYLE & DENMAN

#### ATTORNEYS FOR

OFFICE & POST OFFICE ADDRESS

10 ELLICOTT SQUARE COURT

ELLICOTT SQUARE BUILDING
BUFFALO, NEW YORK 14203

(716) 856-3486

To

Attorney for

INDEX NO.

YEAR 19

STATE OF NEW YORK

U. S. COURT OF APPEALSCOURT

County of

ERIE

THE UNITED STATES OF AMERICA,

Appellee

VS.

JOSEPH A. LOMBARDO,

Appellant

ORIGINAL

AFFIDAVIT OF SERVICE

#### DOYLE & DENMAN

ATTORNEYS FOR Appellant

OFFICE & POST OFFICE ADDRESS 10 ELLICOTT SQUARE COURT ELLICOTT SQUARE BUILDING BUFFALO, NEW YORK 14203 (716) 856-3486

To

Attorney for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney for

SAMSON PAPER CO., CONSHOHOCKEN, PA